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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 636

ELECTRIC BOND AND SHARE COMPANY ET AL.,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 2172–2213) is reported in 18 F. Supp. 131. The opinions of the Circuit Court of Appeals for the Second Circuit (R. 2315, 2334) are reported in 92 F. (2d) 580.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered November 15,

1937 (R. 2335). The petition for a writ of certiorari was filed December 14, 1937, and was granted January 3, 1938. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

I. Whether the bill to compel certain of the petitioners to comply with sections 4 (a) and 5—the registration provisions—of the Public Utility Holding Company Act of 1935 (hereinafter generally referred to as the Act) requires for its disposition, or permits, a judicial determination of the validity of other provisions of the Act.

II. Whether sections 4 (a) and 5 of the Act, which the bill seeks to enforce against certain of the petitioners, are a valid exercise of the federal power over interstate commerce and the mails as applied to such petitioners.

III. Whether petitioners' cross-bill attempting to contest the validity of provisions of the Act applicable only to registered companies, before any of the petitioners has registered or become a subsidiary of a registered company, was properly dismissed by the courts below.

STATUTE INVOLVED

The statute involved is the Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 803). The Act, together with a summary explanation of its objectives and the scope

and operation of its principal provisions, is separately printed as Appendix A to this brief.

Broadly speaking, the Act provides for regulation by the Securities and Exchange Commission of those public-utility holding companies whose activities transcend state lines; a holding company within the meaning of the Act is a company which *actually controls* electric or gas utility companies. The Act is divided into six groups of regulatory provisions covering the following subjects: registration (sections 4 and 5); issuance of securities (sections 6 and 7); acquisition of securities and utility assets (sections 8, 9, and 10); corporate simplification and reorganization (section 11); service contracts and other inter-company transactions (sections 12 and 13); and reports and accounts (sections 14 and 15). The remaining sections are concerned with the administration and enforcement of these six groups of regulatory provisions—e. g., definitions (section 2); exemptions (section 3); and administrative procedure, penalties, etc. (sections 16 to 33).

The provisions of the Act immediately involved in this proceeding are sections 4 (a) and 5, which provide:

"TRANSACTIONS BY UNREGISTERED HOLDING COMPANIES

"SEC. 4. (a) After December 1, 1935, unless a holding company is registered under section 5, it

shall be unlawful for such holding company, directly or indirectly—

"(1) to sell, transport, transmit, or distribute, or own or operate any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce;

"(2) by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company;

"(3) to distribute or make any public offering for sale or exchange of any security of such holding company, any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or to sell any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering;

"(4) by use of the mails or any means or instrumentality of interstate commerce, to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company;

"(5) to engage in any business in interstate commerce; or

"(6) to own, control, or hold with power to vote, any security of any subsidiary company thereof

that does any of the acts enumerated in paragraphs (1) to (5), inclusive, of this subsection."

"REGISTRATION OF HOLDING COMPANIES

"SEC. 5. (a) On or at any time after October 1, 1935, any holding company or any person purposing to become a holding company may register by filing with the Commission a notification of registration, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. A person shall be deemed to be registered upon receipt by the Commission of such notification of registration.

"(b) It shall be the duty of every registered holding company to file with the Commission, within such reasonable time after registration as the Commission shall fix by rules and regulations or order, a registration statement in such form as the Commission shall by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. Such registration statement shall include—

"(1) such copies of the charter or articles of incorporation, partnership, or agreement, with all amendments thereto, and the bylaws, trust indentures, mortgages, underwriting arrangements, voting-trust agreements, and similar documents, by whatever name known, of or relating to the registrant or any of its associate companies as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers;

"(2) such information in such form and in such detail relating to, and copies of such documents of or relating to, the registrant and its associate companies as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers in respect of—

"(A) the organization and financial structure of such companies and the nature of their business;

"(B) the terms, position, rights, and privileges of the different classes of their securities outstanding;

"(C) the terms and underwriting arrangements under which their securities, during not more than the five preceding years, have been offered to the public or otherwise disposed of and the relations of underwriters to, and their interest in, such companies;

"(D) the directors and officers of such companies, their remuneration, their interest in the securities of, their material contracts with, and their borrowings from, any of such companies;

"(E) bonus and profit-sharing arrangements;

"(F) material contracts, not made in the ordinary course of business, and service, sales, and construction contracts;

"(G) options in respect of securities;

"(H) balance sheets for not more than the five preceding fiscal years, certified, if required by the rules and regulations of the Commission, by an independent public accountant;

"(I) profit and loss statements for not more than the five preceding fiscal years, certified, if required by the rules and regulations of the Commission, by an independent public accountant;

"(3) such further information or documents regarding the registrant or its associate companies or the relations between them as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

"(c) The Commission by such rules and regulations or order as it deems necessary or appropriate in the public interest or for the protection of investors or consumers, may permit a registrant to file a preliminary registration statement without complying with the provisions of subsection (b); but every registrant shall file a complete registration statement with the Commission within such reasonable period of time as the Commission shall fix by rules and regulations or order, but not later than one year after the date of registration.

"(d) Whenever the Commission, upon application, finds that a registered holding company has ceased to be a holding company, it shall so declare by order and upon the taking effect of such order the registration of such company shall, upon such terms and conditions as the Commission finds and in such order prescribes as necessary for the protection of investors, cease to be in effect. The denial of any such application by the Commission shall be by order."

It is important to note that, even though a holding company carries on through the federal channels of intercourse one or more of the businesses or activities enumerated in section 4 (a), it is not required to register if it falls within one of the five classes of companies exempted from the Act by section 3 (a). The first and most important of

such classes of exempted companies is the holding company whose system is predominantly intrastate in character and within the effective control of a single state. The exemptions afforded by section 3 qualify and limit all the other provisions of the Act including those relating to registration (see pp. 189–192, *infra*).

Registration is effected by the filing of a notification of registration under section 5 (a). Pursuant to section 5 (c), the Commission has fixed ninety days as the time within which a registered company must thereafter file the information and documents required in the registration statement under section 5 (b).[1] The form and detail of such information is subject to regulation by the Commission, but the Congress has designated with precision the type of documents and the character and extent of the information which it recognized as "necessary or appropriate in the public interest or for the protection of investors or consumers."

Section 22 (a) provides that the information supplied under section 5 shall be information of record to be made available to investors, consumers, and the general public, as well as to the states and their regulatory bodies, except when such disclosure is found by the Commission to be detrimental to the public interest.

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[1] Rule 5 B–1. Registration Statements—Form and Time of Filing (Securities and Exchange Commission, General Rules and Regulations under the Public Utility Holding Company Act of 1935 (April 15, 1937) pp. 21–22).

STATEMENT

This suit was begun in the United States District Court for the Southern District of New York on November 26, 1935. For convenience, the parties are referred to in this brief according to their designations in the record.[2]

The Commission's amended and supplemental bill of complaint (R. 5–64) sought to compel the Electric Bond and Share Company and twelve intermediate holding companies in the Bond and Share holding-company system to comply with sections 4 (a) and 5 of the Act.[3] Such a suit to enforce

[2] The petitioners are generally referred to as the defendants. The respondent Securities and Exchange Commission is generally referred to as the plaintiff or the Commission; the individual respondent officers are generally referred to as the cross-defendants; and the respondents collectively are sometimes referred to as the Government.

[3] Originally the Government sought to compel Bond and Share and fourteen of its intermediate holding companies to register, but two of these, Idaho Power Company and The Montana Power Company, ceased to be holding companies within the meaning of the Act before the cause was heard by the District Court (R. 266), and accordingly no decree was sought against them. The Government was subsequently notified by defendants (brief before Circuit Court of Appeals, p. 2) that, after the trial court's decision, four of the defendants included in the decree—United Gas Corporation, United Gas Public Service Company, Houston Gulf Gas Company, and Nebraska Power Company—had ceased to be holding companies within the meaning of the Act. And according to defendants' brief in this Court (p. 10n.), one more defendant, Power Securities Company, has ceased to be a holding company since the decision of the Court of Appeals. Each such company would automatically be released from the decree of the District Court (R.

a provision of the Act is expressly authorized by section 18 (f).

The defendants' answer to the bill of complaint was divided into two parts: a first defense, paragraphs 1–23, R. 94–124 (hereinafter generally referred to as the answer), and a separate and distinct defense by way of counterclaim and cross-bill, paragraphs 24–51, R. 124–197 (hereinafter generally referred to as the cross-bill). By their answer, defendants sought to have the bill dismissed on the ground that not only sections 4 (a) and 5, but the entire Act, including each and every provision thereof, was unconstitutional. By their cross-bill, defendants sought to enjoin the plaintiff Commission and the individual cross-defendants from enforcing any provision of the Act and sought to obtain a declaratory judgment that the whole Act,

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2261–2262), and would be entitled to apply to that Court (which retained jurisdiction for the making of further orders) for an appropriate order confirming such release (R. 2265).

A number of other companies in the Bond and Share system were permitted to intervene as defendants (R. 88–91). None of them is obliged by the terms of the Act or the regulations of the Commission to register, and against none of them did the Government seek or obtain a decree (see Appendix B, p. 2n.).

Unless otherwise specified, the term defendants in this brief refers only to the thirteen defendants included in the District Court's decree (R. 2261; 2218–2219, finding 8); and to simplify the discussion, the change in status of five of these thirteen defendants subsequent to the District Court's decree is ignored in referring to the defendants collectively.

including each and every provision thereof, was unconstitutional.

A stipulation of facts upon which the District Court based its findings of fact and conclusions of law (R. 2214–2259) was agreed upon between the parties and is set forth in full in the record (R. 261–2165). The stipulation included "the evidentiary facts which any party deemed relevant to the proceeding or desired to present to the Court, without the opposing parties conceding the relevancy or materiality of such facts" (R. 2216). No other evidence was offered upon the trial of the cause.

Bond and Share and the twelve other holding-company defendants are holding companies within the Act (R. 264–266, 2218); have not registered under the Act (R. 270, 2230); have not applied for and are not entitled to any exemption under the terms of the Act (R. 155–156, 268–269, 2226–2228, 2230); and have been and are now engaged in activities, transactions, and the performance of contracts in the ordinary course of business, as conducted for many years past, which are forbidden to non-registered companies by one or more provisions of section 4 (a). Unless otherwise ordered by final decree in this cause, these defendants propose to continue to engage in such activities, transactions, and performance of contracts without registering (R. 270, 2230).

The activities and functions of the thirteen defendants, carried on through the mails and chan-

nels of interstate commerce, which both courts below found to fall within the authority of the federal government and to justify the requirement of registration, are described, in light of the origin, development, and operation of the Bond and Share system, in a Factual Summary separately printed as Appendix B to this brief. As is more fully explained in the Factual Summary, Bond and Share is the top holding company, and the other twelve defendants are intermediate holding companies, of one of the largest public-utility holding company systems in the United States.

Bond and Share and the twelve other defendants are each engaged, themselves or through one or more subsidiary companies, in the sale and transmission of electric energy or gas in interstate commerce (R. 2230–2237; Appendix B, pp. 41–43, 101–103). Such interstate activities are not spasmodic or casual but are continuous and substantial. More than 31 per cent of the total electric energy generated by Bond and Share subsidiaries is transmitted across state lines, and more than 25 per cent of all the electric energy transmitted across state lines in the United States is handled by Bond and Share subsidiaries (R. 2231–2232; Appendix B, pp. 41–42). At least half of the energy so transmitted across state lines is sold to other companies, associate and non-associate (R. 2059). The Bond and Share System handles approximately 15 per cent of

all the electric energy generated in the United States (R. 2231; Appendix B, p. 41). The system also carries on a comparably extensive business in natural and manufactured gas (R. 2235–2237; Appendix B, pp. 42–43). Approximately 47 per cent of the gas handled by Bond and Share companies is transported across state lines (R. 2236; Appendix B, p. 43), and this constitutes more than 20 per cent of all the gas transported across state lines in the United States (R. 2235–2236; Appendix B, p. 43).

Bond and Share, itself or through its intermediate holding companies, has acquired control of gas and electric properties in 32 States, from Pennsylvania to Oregon and from Minnesota to Florida (R. 282, 2114, 2160; Appendix B, p. 41). As to the fact of such control, there is no issue in this proceeding (see p. 108n., *infra;* see also Appendix B, pp. 55–57). Bond and Share's control, and that of its intermediate holding companies, over a major part of the utility industry in the United States, has been built up and is maintained with a relatively small amount of its own funds (R. 851–853; Appendix B, pp. 43–54). The funds were obtained from the public by the marketing of securities through the mails and the channels of interstate commerce (R. 1854–1895; Appendix B, pp. 49–50, 104–107) during periods when large write-ups existed on the books of Bond and Share and the subsidiary companies (R. 923 ff.; see Appendix B, pp.

11–13, 19–20, 23–24, 27–28, 34, 43–45).[4] Bond and Share and the twelve other defendants in the normal course of their business will continue to use the mails and channels of interstate commerce in the making of public offerings of securities (R. 2247) and for the acquiring of securities and utility assets (R. 2248); and both defendant Bond and Share (through its wholly-owned subsidiary Ebasco)[5] and defendant American Gas,[6] another subsidiary of Bond and Share, presently undertake through the mails and channels of interstate commerce to render regularly and continuously to their subsidiary operating companies for a charge a wide variety of services (R. 2237–2245; Appendix B, pp. 108–122), involving, among other things, the direction of purchases and the shipment of goods in interstate commerce (R. 2240–2241; Appendix B, pp. 118–121).

The District Court held that the registration provisions were the only provisions of the Act as to which any justiciable controversy existed or was

[4] Although the operating utility industry is generally considered to be a stable industry, arrears on publicly held preferred stocks of companies within the Bond and Share system (not including American & Foreign Power and its subsidiaries) have aggregated more than $60,000,000 (R. 911; see Appendix B, p. 100). Bond and Share itself has made extensive use of its funds for costly speculations in the shares of its American subsidiary companies (Appendix B, p. 53n.) as well as for foreign ventures (Appendix B, p. 48–49n., also p. 24).

[5] For the transfer of American Gas' service organization to a new subsidiary in January of this year, see p. 215, *infra*.

presented to the court; that the registration provisions were separable from the other provisions of the Act and standing alone served a useful purpose to which legal effect could be given; and that the registration provisions, as applied to the thirteen defendants, constituted a valid exercise by the Congress of the federal power over interstate commerce and the mails (R. 2252–2254). The District Court further held that the cross-bill presented no justiciable case or controversy, and no "actual controversy" within the Federal Declaratory Judgments Act, and that in any event defendants had failed to show irreparable or substantial damage, present or imminent, to support the cross-bill (R. 2258–2259).

By its decree (R. 2260–2265) the District Court dismissed the cross-bill both as against the plaintiff Commission and the individual cross-defendants, and awarded relief as prayed for in the bill of complaint by ordering that the thirteen defendants be enjoined, so long as they shall not have registered with the Commission under sections 4 (a) and 5 (a) of the Act, from carrying on any of the activities in interstate commerce or through the mails forbidden to non-registered holding companies by paragraphs (1), (2), (3), (4), and (6) of section 4 (a).*

* The District Court ruled (R. 2207) that, since all of the defendants' activities in interstate commerce and the mails were within one or more of these paragraphs of section 4 (a), it was unnecessary to consider whether they also fell within the remaining paragraph (5).

The Circuit Court of Appeals, all three judges concurring, affirmed the District Court's decree both in the enforcement of the registration provisions and the dismissal of the cross-bill (R. 2335). In his opinion, Judge Manton held that the registration provisions were separable from the other provisions of the Act, were capable of separate operation and enforcement as a regulatory measure in their own right, and were constitutional as applied to the defendants (R. 2315–2332). Judge Manton further held that the cross-bill had been properly dismissed; that, as to the registration provisions of the Act, all questions had been settled on the bill and answer; that, as to the remaining provisions of the Act, the cross-bill failed to present a justiciable controversy, or an "actual controversy" as required by the Federal Declaratory Judgments Act, and constituted merely an attempt to obtain an advisory opinion on a hypothetical state of facts; that in any event the cross-bill stated no controversy with the plaintiff Commission or any cross-defendant since neither the plaintiff nor any cross-defendant had threatened to enforce any provision of the Act other than the registration provisions; and, further, that defendants' failure to adduce any proof of irreparable injury, present or threatened, prevented their obtaining injunctive relief (R. 2332–2333). Judge Swan concurred in the result (R. 2333). In a separate concurring opinion, Judge Learned Hand stated that he found it unnecessary to determine whether the registra-

tion provisions could stand alone, and that he preferred to affirm the District Court's decree on the ground that there were sufficient provisions in the Act, the constitutionality of which was free from all doubt, to which sections 4 (a) and 5 were validly related and with which they could validly stand (R. 2334–2335).

SUMMARY OF THE LEGISLATIVE FINDINGS

For the convenience of the Court, the legislative findings in the Public Utility Holding Company Act of 1935, upon which the Congress based its exercise of the federal power, are here briefly discussed. These findings, which are set forth in section 1 of the Act, were expressly predicated by the Congress upon the recommendations of public investigatory agencies which had been intensively exploring the utility holding-company industry for many years prior to passage of the Act.[7]

1. THE HOLDING COMPANY AND THE NATIONAL PUBLIC INTEREST

Section 1 of the Act sets forth the factors which the Congress found to make national control of

[7] Section 1 (b) states: "(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared * * *."

public-utility holding companies necessary. The Congress starts, as it has the right to start, with the fact that a public-utility company is affected with a public interest, and that a company which controls and dominates a public-utility company is likewise, in the constitutional sense, a company affected with a public interest, and is likewise subject to regulation and control for the public good under the police power of government. No technical rule limits the reasonable exercise of the police power to any particular class of persons. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Nebbia* v. *New York,* 291 U. S. 502.

The Congress declared in section 1 (a) that a public-utility holding company, being affected with a public interest, is affected with a *national* public interest when it builds up and maintains its control and influence over operating companies by the use of the mails and channels of interstate commerce, and that the Congress has the power to employ its authority over the mails and over interstate commerce to prevent the spread and perpetuation of evils and abuses which result from the public-utility holding company's use of the mails and those channels of commerce. *Brooks* v. *United States,* 267 U. S. 432; *In re Rapier,* 143 U. S. 110.

While utility *operating* companies may be confined in their activities to a single region, often within a single state, and may be essentially local in character, the Congress found that most utility

holding companies have not confined themselves to a single state or operating area. They have become interstate in their interests and interstate in their activities. The investors whose funds they solicit and whose properties they control are scattered throughout the nation. The properties they control and the consumers affected by their management are not confined to a single state. The states in which the holding companies seek the shelter of incorporation seldom have an interest in their regulation, because their principal interests and activities are in other states.[8]

It is clear from the findings set forth in section 1 (a) that the Congress did not reach out to take from the states their legitimate powers or the rights reserved to them under the Constitution.[9] The Act

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[8] The State of New York, for example, has slight interest in controlling the activities of the Bond and Share companies. Their interests and activities, the consumers they serve, the investors whose funds they employ, are not in the State of New York. Not one of the numerous operating utility companies supervised and controlled by Bond and Share is located in the State of New York. In fact, *not a single operating utility in the Bond and Share system is located in any of the five states—New York, Maine, New Jersey, Delaware, and New Hampshire—in which are incorporated the thirteen holding companies in the Bond and Share system which were directed by decree of the District Court to comply with the registration provisions of the Act.*

[9] The theory upon which the Congress proceeded and the necessity which moved it to action were stated by Senator Borah of Idaho in the course of the debate in the Senate: "The activities of some of these holding companies have been perfectly lawless. They have been in disregard of the interests of those to whom they were selling

is directed exclusively at the corporate and financial relationships and dealings between or affecting the holding company organized in one state and its subsidiaries which are not confined to that state. *The Act is aimed only at the holding company which controls operating utilities in states other than its domicile and which utilizes the channels of interstate commerce to carry out important and essential holding-company purposes.* The Act is intended to prevent such an interstate holding com-

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their stocks and their securities. They have been in disregard of the interests of the community and they have been in disregard of the interests of the entire country. It is by reason of those things that it became absolutely necessary that the Congress of the United States deal with the subject matter covered by the bill before us.

"We certainly could not permit those things to go on indefinitely. We certainly could not permit such practices to prevail as a permanent proposition; somebody had to deal with the question. I know of nobody to deal with such companies as those which spread across State lines and control subsidiaries acting in different States of the Union except the Congress of the United States.

"* * * It seems to me that a company which owns 30 or 40 or even 5 or 6 subsidiary companies and affiliates, which subsidiary companies are operating in different States, and which this holding company must control by utilizing the means of transportation or the means of communication between the different States—a holding company which conducts the business, determines the policy, and directs the course of these different subsidiary companies, and does it through employing the channels either of the mail or of the telephone or of the telegraph—must necessarily be under the control of the National Congress, or under the control of nobody whatever. They would be in a 'no man's land' if that were not true." (Congressional Record, 74th Congress, 1st Session, p. 9049.)

pany from directly abusing and burdening those channels. The Commission is expressly directed to exempt a holding company and its subsidiaries from the provisions of the Act if the holding-company system is predominantly intrastate in character and within the effective control of a single state, even though the company carries on some activities in interstate commerce and the mails (section 3 (a) (1); see pp. 189–190, *infra*). "By its very nature," the kind of holding company which falls within the Act "transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause." *Fisher's Blend Station, Inc.* v. *Tax Commission*, 297 U. S. 650, 655.

As the Report of the National Power Policy Committee to the President and to the Congress points out:

> Holding-company operations are too extensive, State commission powers and funds too limited, to make thorough and effective State action possible. And usually the holding companies have purposely arranged their organization and operations to keep out of reach of State regulation; their lawyers have challenged the jurisdiction of such regulation. Generally a holding company itself is incorporated outside the States in which its operating companies are located and carefully does not do business within those States in a manner which will

give State commissions technical power to reach the books and records of the holding company. Even if obtainable, however, such books and records will be comparatively unintelligible and even misleading until uniform accounting methods are made compulsory. There is the further difficulty of allocating the appropriate proportion of the cost of holding-company activities to its subsidiaries in a particular State, coupled with needless waste in having the process duplicated in State after State. These difficulties of State agencies are so fundamental that not even interstate compacts—assuming they could be evolved—can make State regulation practically effective without supplemental help from a Federal law. (Report of the National Power Policy Committee to the House of Representatives, 74th Congress, 1st Session, House Doc. No. 137, pp. 7–8.)

2. HOLDING COMPANY ABUSES

Section 1 (b) of the Act recites the definite holding-company abuses which the Congress found to be spread and perpetuated by the use of the national channels of commerce, and which experience had demonstrated could not effectively be corrected by state legislation. Specifically, holding-company securities are usually issued and sold without the consent or approval of the states having jurisdiction over the subsidiary public-utility companies; these securities are often issued upon the basis of fictitious asset values and in anticipation

of excessive revenues and paper profits at the expense of the underlying operating companies; absence of adequate reports and uniform accounts frequently conceals the unsubstantial foundation of these security issues and makes it impossible for investors in the several states to secure the information necessary for an adequate appraisal of the financial position of the companies. These findings point to the fact that the unsound capitalization of holding companies has operated to the detriment not only of widely scattered investors but also of consumers of the utility products of the underlying operating companies.[10]

[10] As the Federal Trade Commission stated in its report to the Congress: "The effect of all this issuance of securities against written-up properties may be viewed from two angles, namely, that of the rate payer and that of the investing public. As far as the latter is concerned, it is obvious that the securities owned are not supported by values of properties which appear in the balance sheet of the company issuing such securities. In case of liquidation, it is questionable in many cases whether there could be realized sufficient cash from the sale of the assets of the company to liquidate the securities at their book values. A further effect on the investor is the fact that a failure to earn on excessive security issues and consequently to pay interest or dividends on securities issued (especially in case of heavily written-up properties) has undoubtedly been a principal cause of receiverships and other financial difficulties through which many utility systems are now passing. Practices of this sort have constituted one of the gravest dangers developed during the course of the entire investigation.

"As to the rate-paying public, this matter is discussed at some length elsewhere (see ch. V). Suffice it to say here that while in States having utility regulation the usual theory of rate-making presupposes a return based on the actual values

The Congress further found that holding companies, in order to support their overcapitalized security structures, have frequently been under pressure to squeeze the maximum possible revenue out of operating companies. They have resisted voluntary rate reductions which might have strengthened their subsidiaries and increased the consumption of gas and electricity; they have obtained unfair insiders' profits through a great variety of inter-company transactions; they have obstructed state regulation through their control of the accounting practices and financial policies of their operating properties; and they have too frequently brought under common control widely distant utility facilities, creating gerrymandered systems, in complete disregard of the economies of management and the integration and

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of properties, it is unquestionably a fact that the book values have considerable effect on the regulating authorities or complainants in rate cases. This was recognized in a recent decision of the Public Service Commission of the State of New York, in which the following statement was made: 'Overcapitalization was not only undesirable from the viewpoint of the security holder, but was most detrimental to the public, for it concealed the true profits and made it appear that rates were reasonable. Such concealment was one of the reasons, if not the principal one in many instances, why companies were overcapitalized.'" (Report of the Federal Trade Commission to the United States Senate, 70th Congress, 1st Session, Senate Doc. No. 92, Part 72–A, p. 327.)

"In most instances these write-ups were injected by the controlling interests and were often based apparently on the amount of bonds and preferred stocks they thought could be marketed." (*Id.* at 846.)

coordination of related properties.[11] The growth of the super-holding company has tended to concentrate control of the electric and gas operating industry in the hands of a few powerful groups having an insignificant stake in their ownership.[12] Concentration of control has tended substantially to restrict competition in supplying the construction and other needs of a great and growing industry.[13]

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[11] "The desire of engineering and manufacturing groups to secure control of the maximum number of utility properties in order to sell commodities and services to these utilities, and the desire of bankers to dominate utility managements in order to secure promotion and underwriting profits, has often resulted in the formation of unwieldy systems of holding companies which could not possibly be justified on grounds of engineering or managerial efficiency. The freedom of the holding company from control by the public service commissions has also been a serious menace—a menace so great that it threatens the whole American scheme of private ownership under governmental regulation." (Bonbright and Means, The Holding Company (1st ed., 1932) p. 93; see also, pp. 166–170, quoted at pp. 130–131 n., *infra*.)

[12] Thirteen large holding-company groups control three-fourths of the privately owned electric utility industry of the country, and over 40 per cent of the entire industry is under the control of three of these large holding groups. (See Report of the National Power Policy Committee to the House of Representatives, 74th Congress, 1st Session, House Doc. No. 137, p. 4.)

[13] In the telephone industry, this Court has recently taken notice of the effect of the concentration of control by use of the holding-company device. In *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, the Court, in sustaining a uniform classification of accounts prescribed by the Federal Communications Commission for telephone companies, stated (299 U. S. at 238–239): "To a great

The Congress thus found, after penetrating and exhaustive investigation, that the uncontrolled utility holding company is "an agency which, unless regulated, is injurious to investors, consumers, and the general public" (section 1 (c)). The Federal Trade Commission, upon whose report, among others, the Congress expressly relied, had concluded that "the Commission is of the opinion on the whole that the detriment of utility holding companies to the public has exceeded, thus far, their value to the public" (Report of the Federal Trade Commission to the United States Senate, 70th Congress, 1st session, Senate Doc. No. 92, Part 73–A, p. 64). No more devastating indictment could have been made. It is no doubt true that there are also abuses in other fields. But no re-

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extent, the telephone business as conducted in the United States is that of a far flung system of parent, subsidiary and affiliated companies. The Bell system is represented in this case by thirty-seven companies, the American Telephone and Telegraph Company at their head. Seven other companies, intervening as a group, represent a second and smaller system. Purchases are frequently made by a member or members of a system from affiliates or subsidiaries, and with comparative infrequency from strangers. At times obscurity or confusion has been born of such relations. There is widespread belief that transfers between affiliates or subsidiaries complicate the task of rate-making for regulatory commissions and impede the search for truth. Buyer and seller in such circumstances may not be dealing at arm's length, and the price agreed upon between them may be a poor criterion of value. *Dayton Power & Light Co.* v. *Public Utilities Comm'n of Ohio*, 292 U. S. 290, 295; *Western Distributing Co.* v. *Public Service Comm'n of Kansas*, 285 U. S. 119; *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133."

sponsible agency ever stated that the railroads with all their early excesses brought a greater degree of evil than good to the country. It was not the operating electric utility companies which the Federal Trade Commission found to be a detriment to the country's welfare, but the holding companies which have superimposed themselves upon the operating utility industry. If utility holding companies, dominating as they do one of the most essential public services in the country, cannot show on a balancing of accounts that they have contributed any net benefit to the public, how can it be said that the Congress was not amply justified in recognizing that there are very practical dangers inherent in the utility holding company which require its regulation in the public interest?[14]

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[14] It is true that the Federal Trade Commission found certain advantages as well as disadvantages in the utility holding company. For instance, the holding company may act as a means by which the operations of different local companies in the same region could be connected and more efficiently operated. Also in *some* instances a holding company has been able to secure money for expansion and improvement at lower annual costs and upon better terms than could the small local operating company. But too often the management of the unregulated holding company has failed to secure these advantages for investors, consumers, and the public. The Act, consequently has been carefully drafted to preserve and safeguard these and any other advantages which may come from the utility holding company. The entire theory of section 11 which provides for the simplification and reorganization of holding companies is built upon these findings with respect to the advantages which may be reaped from the properly regulated holding company. Yet the Federal Trade Commission did expressly

These are the evils and abuses which the Congress sought to eliminate. The Congress found that these evils and abuses are spread and perpetuated by the activities and businesses carried on by utility holding companies through interstate commerce and the mails. (Report of the Federal Trade Commission to the United States Senate, 70th Congress, 1st Session, Senate Doc. No. 92, Part 73–A, pp. 31–36, 41–58, 205–218.) The Congress in some instances not involved in the instant proceeding, found it necessary to reach transactions which directly affect and burden the federal channels of commerce though not themselves consummated through those channels; but in each such instance the Congress realized that its power depended upon the facts of the particular case, and it directed that the Commission should administer the Act accordingly. To this end section 1 (c) expressly provides that it shall be the policy of the Act, and that each provision shall be interpreted, "to meet the problems and eliminate the evils (enumerated in section 1) connected with public-utility holding companies

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state that holding companies seem to have no apparent advantage over large, well-established, operating companies in borrowing money (Report of the Federal Trade Commission to the United States Senate, 70th Congress, 1st Session, Senate Doc. No. 92, Part 72–A, p. 837), and that some existing independent operating companies, both privately owned and municipal systems, particularly among larger ones of each class, stand as contradictions to practically all the claimed advantages of the holding company (*Id.*, Part 73–A, pp. 63–64).

which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce."

In the light of the findings of the Congress, the Trade Commission and other public and private bodies, it is impossible to comprehend defendants' sweeping assertion that the Act subjects to regulation "a multitude of activities in interstate commerce and uses of the mails and the channels of interstate commerce which have not been and could not be found by Congress to be harmful or likely to result in harm" (brief, p. 74). It was just these activities that the Congress found, upon evidence which the defendants have not undertaken to controvert, to result in the spread of injury and harm to the people of the various states and to constitute the holding-company evil a grave evil beyond the practical and legal power of any state.

SUMMARY OF ARGUMENT

PART I. THE BILL AND ANSWER INVOLVE SOLELY THE VALIDITY OF THE REGISTRATION PROVISIONS

The plaintiff's bill seeks only to require defendants to comply with sections 4 (a) and 5, the registration provisions of the Act. Unless defendants can show that they are under no duty to register, the Government is entitled to a decree upon the bill and answer. Defendants' obligation to register involves solely the validity of sections 4 (a) and 5 and is not affected by the validity or invalidity of

any other provision of the Act. This is so for the following reasons:

I. The registration provisions are plainly capable of separate operation and enforcement, and are not, as the defendants would have this Court believe, inextricably intertwined with, or inherently inseparable from, the other provisions of the Act. It is true that if the registration provisions were adjudged invalid, nearly all other provisions of the Act would fail because they are so drafted as to be applicable only to "registered" companies. But the converse is not true; the enforcement of the registration provisions is in no wise dependent upon the operation of any other provision of the Act. Standing alone, the registration provisions may accomplish *less* than what the Congress hoped for, but *nothing different* from what the Congress intended.

Compliance with the registration provisions does not bind a company to observe any other provision of the Act (*Union Pacific R. Co.* v. *Public Service Commission,* 248 U. S. 67; *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490), and the rules of the Commission expressly provide that registration shall not waive or impair any constitutional or legal right (R. 649, 2253).

The registration provisions constitute an effective instrument of regulation by the force of public information; and the informatory process has frequently been employed by the Congress as a means of regulation. *Interstate Commerce Commission*

v. *Brimson*, 154 U. S. 447, 473–474; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 211; *McDermott* v. *Wisconsin*, 228 U. S. 115, 131; *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232. In similar circumstances this Court has held such regulation separable from other regulatory features of a comparable statute. *Weller* v. *New York*, 268 U. S. 319.

The presumption of separability created by section 32 has not been rebutted. To the contrary, everything in the record corroborates the presumption. The legislative history of the Act, the form of the statute, and the classification of its subject-matters, all indicate that the Congress deliberately planned to make separable not simply the various sections of the Act, but the subsections, paragraphs, and clauses within the sections. The precise points at which the parts might be severed in case of need have been clearly indicated by the Congress in drafting the statute, and no rewriting of the statute would be required in the event that one or more portions were to fail.

II. If the registration provisions are capable of separate operation and enforcement and are not inherently indivisible from other provisions of the Act, defendants cannot object that the registration provisions are too fragmentary or unsubstantial to stand alone.

In the first place, the registration provisions are not too fragmentary to stand alone. As informatory requirements, the registration provi-

sions constitute a substantial regulation of the activities and transactions, specified in section 4 (a), carried on by utility holding companies in interstate commerce and the mails, and were so regarded by the Congress. The Congress has found that, in the absence of full and accurate information, such activities impair the credit and good-will of interstate gas and electric utility enterprise; cause and spread injury to investors and consumers throughout the states; and obstruct the states and their regulatory bodies in the exercise of state powers over local utilities. Experience has demonstrated that publicity is an effective deterrent to financial chicanery and abuse; and the Congress, therefore, enacted the registration requirements to prevent, or at least to mitigate, some of the grave injuries and abuses with which it was attempting to deal. Even defendants are required to concede that the Committee of Public Utility Executives, in which defendants participated, urged before the Congress that "a system of publicity was all that was required" (brief, p. 65). As the District Court expressly found: "There is nothing in the Act or in the legislative history of the Act to indicate that the Congress, if it had thought that any or all provisions of the Act other than sections 4 (a) and 5 were invalid, would not have enacted sections 4 (a) and 5 alone as affording some, if not the fullest, measure of relief from the evils and abuses set forth in section 1" (R. 2223). That the Congress regarded the registration provisions as a

separate regulation in their own right, and did not enact these informatory requirements merely to aid in the administration of what the defendants designate as the "control" provisions of the Act, is clearly shown by the fact, among others, that each so-called control section carries its own provision requiring the filing of such information as the Congress deemed necessary to aid in its administration.

In the second place, defendants have no standing to attack provisions of the Act—which do not apply to defendants and which are not otherwise in controversy—merely to show that if such provisions were adjudged invalid, the registration provisions, although plainly capable of separate operation and enforcement, would accomplish so little of what the Congress intended that it is not reasonable to suppose that the Congress would desire them to remain standing if all the rest of the Act were to fail. While it is true that the courts may refuse to preserve valid fragments of a statute *after* the warp and woof of the statute has been torn away, the courts have never refused to enforce valid fragments of a statute *before* any judicial necessity has arisen for tearing away the warp and woof. Defendants seek to transform a doctrine of judicial necessity—which compels a court, *after* major portions of a statute have been adjudged unconstitutional in actual controversy, to inquire whether the remainder ought nevertheless to be enforced—into a doctrine of needless anticipation of constitutional

issues. The precipitation of issues of constitutionality in this fashion finds no warrant in the decisions of this Court. *Yazoo & M. V. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217; *Heald* v. *District of Columbia*, 259 U. S. 114; *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226; *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495.

Part II. The Registration Provisions are Constitutional

The registration provisions of the Act are a simple and direct exercise of Congressional authority under the commerce clause and postal power. The registration provisions are confined to the regulation of the use of the mails and channels of interstate commerce.

The sole question raised by the registration provisions is the right of the Congress to require a public-utility holding company which itself or through a subsidiary company transmits electric energy or gas across state lines or uses the channels of interstate commerce or the mails for certain specified and important financial and service transactions and activities, to file pertinent information relating thereto, which the Congress regards important in the public interest or for the protection of investors and consumers.

Certain provisions of the Act are applicable to acts of registered companies not carried on through the mails or the channels of interstate commerce. But these provisions are not here the subject of

actual controversy. If they were, a question might arise whether these acts so directly affect or burden the mails or interstate commerce as to come within the scope of federal power. In the instant proceeding the sole issue in controversy is the duty of the defendants to register because they *do use* the channels of interstate commerce and *do use* the mails for essential corporate activities.

(1) As one of the means of combating the abuses of holding-company finance, the Congress may require full publicity regarding the financial position and intercorporate relations of utility holding companies which engage in interstate transmission of electric energy or gas or which use the federal channels of intercourse to carry out financial transactions or service contracts. It has the same power when such holding companies do the same acts through their controlled subsidiaries. The holding-company relationship is not a means to constitutional insulation from statutory responsibility. *Northern Securities Co.* v. *United States,* 193 U. S. 197; *Western Distributing Co.* v. *Public Service Commission,* 285 U. S. 119. Congress may recognize, as has this Court, that "it is with the system that the law must deal, not with its elements." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498, 523. It is clear also that in regulating activities carried on through the federal channels of commerce, the Congress has power to demand information regarding intrastate activities not carried on

through the federal channels of commerce if such information is necessary or appropriate to a proper appraisal of the significance and effects of activities carried on through federal channels of commerce. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288.

The information called for by section 5 (b) has a definite and appropriate relationship to the activities enumerated in section 4 (a), namely, interstate commerce in gas and electric energy; the performance of service, sales, and construction contracts in interstate commerce and the mails; the distribution and public offerings of securities in interstate commerce and the mails; and the acquisition of securities and utility assets in interstate commerce and the mails. The information so required by section 5 (b) is reasonably related to the acts regulated under section 4 (a) and to the evils sought to be remedied by the Act, which are spread and perpetuated through the federal channels of intercourse. And the District Court so found (R. 2225–2226).

(2) The specific exercises of federal power embodied in the registration provisions of the Act are predicated upon general principles clearly established by decisions of this Court. The Congress has the power, subject only to the limitations of the Bill of Rights, to prevent the use of the

postal facilities[15] and the channels of interstate commerce[16] for a purpose or in a manner which the Congress reasonably deems contrary to sound public policy. The great variety of cases in which prohibitions or regulations of interstate or postal transactions have been upheld show clearly that the Congress may impose such prohibitions or regulations to combat evils of a widely varying nature. The physical acts regulated need not be inherently harmful; their evil may lie in the purposes for which they are undertaken (*Caminetti* v. *United States*, 242 U. S. 470) or in the consequences which usually attend them (*Brooks* v. *United States*, 267 U. S. 432; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334).

"Whatever the limits to its power, it [the Congress] may forbid any such acts [by use of the mails] done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not." *Badders* v. *United States*, 240 U. S. 391, 393. "Congress can cer-

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[15] *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288; *Badders* v. *United States*, 240 U. S. 391.

[16] *Champion* v. *Ames*, 188 U. S. 321; *Seven Cases* v. *United States*, 239 U. S. 510; *Caminetti* v. *United States*, 242 U. S. 470; *Weeks* v. *United States*, 245 U. S. 618; *United States* v. *Hill*, 248 U. S. 420; *United States* v. *Simpson*, 252 U. S. 465; *Brooks* v. *United States*, 267 U. S. 432; *Thornton* v. *United States*, 271 U. S. 414; *Gooch* v. *United States*, 297 U. S. 124; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334.

tainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce." *Brooks* v. *United States*, 267 U. S. 432, 436-437. Moreover, "when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose." *Hamilton* v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146, 156.

Lotteries, obscenities, thefts, and frauds do not constitute closed categories to which the exercise of the federal power over the mails and channels of interstate commerce is limited. The federal power may be exercised by the Congress in accordance with its own view of sound public policy. "The power to regulate interstate commerce resides in the Congress, which must determine its own policy." *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, 347. "The Congress in exercising the power confided to it by the Constitution is as free as the States to recognize the fundamental interests of free labor" (*Id.* at 352). It is equally free to recognize the fundamental interests of investors (Cf. *New York Central Securities*

Corp. v. *United States*, 287 U. S. 12) and consumers (*Hipolite Egg Co.* v. *United States*, 220 U. S. 45). It may be conceded, for the purposes of this proceeding, that the Congress cannot exercise either the commerce power or the mail power to meet evils which are not spread or perpetuated by the use of the channels of interstate commerce or the mails. That is the doctrine of *Hammer* v. *Dagenhart*, 247 U. S. 251. And while opinions may differ as to the applicability of the doctrine to any particular statute, just as this Court divided on the applicability of the doctrine to the validity of the Child Labor Statute, the doctrine itself need not here be questioned. In view of the express findings of the Congress (section 1 of the Act) and of the District Court (R. 2225–2226), it is clear that the evils at which the Holding Company Act is aimed, are spread and perpetuated by the use of the federal channels of commerce.

(3) The power of the Congress to regulate the use of the channels of interstate commerce or the mails is not abridged by the fact that the use of such channels of intercourse is sporadic or is incidental to other activities or is not the major activity of the user. *United States* v. *Hill*, 248 U. S. 420; *United States* v. *Simpson*, 252 U. S. 465; *Hoke* v. *United States*, 227 U. S. 308; *Public Utilities Commission* v. *Attleboro Steam & E. Co.*, 273 U. S. 83, 90. Transactions in the federal channels of commerce are not removed from the scope of federal power by dubbing them—whether justly or

unjustly—incidental. The fact is, however, that the record does not bear out the defendants' pleadings that their use of the mails or channels of interstate commerce is merely incidental to their local activities. But even if the uses which defendants make of the mails and the channels of interstate commerce were an incidental part of defendants' business, such uses would still be subject to the federal power.

(4) There certainly is nothing in the simple publicity requirements of the registration provisions which violates due process or constitutes an invalid delegation of legislative power.

Part III. The Cross-Bill Was Properly Dismissed

The cross-bill raises no question regarding the registration provisions, because every issue arising under sections 4 (a) and 5 must of necessity be disposed of on the bill and answer. As the Circuit Court of Appeals stated in its opinion: "The cross-bill is concerned only with provisions of the Act which deal with registered holding companies since the bill and answer provide ample opportunity to decide the issues presented by § 4 (a) and § 5 of the registration sections" (R. 2332).

Moreover, the cross-bill presupposes not only the validity of the registration provisions, but also their inherent separability. Only if the registration provisions are capable of separate operation and enforcement and thereby legally require de-

fendants to register, can defendants have even hypothetical concern with the provisions of the Act which they seek to attack by the cross-bill. Defendants admit that on any other assumption the sufficiency of the cross-bill is "academic" (brief, p. 112).

The District Court properly determined that it was without jurisdiction to entertain the cross-bill against the plaintiff Commission or the individual cross-defendants (defendants assigned no error to the dismissal against the Commission); and the dismissal of the cross-bill against the individual cross-defendants was properly affirmed by the Circuit Court of Appeals. This is so for the following reasons:

I. The cross-bill seeks merely an advisory opinion upon a hypothetical state of facts, and does not involve an existing case or controversy. The defendants are not registered holding companies and are not even within the terms of the provisions of the Act which they seek to contest by their cross-bill. The defendants by retaining their status of non-registered holding companies have deliberately insulated themselves against the enforcement of these provisions and any action of the Commission thereunder (R. 268). Their cross-bill merely poses a variety of hypothetical controversies which might arise if they should give up their status of non-registered companies and if thereafter they should so conduct their affairs as to come into contact with one or more of the provisions

applicable to registered companies or with the action of the Commission thereunder. Moreover, the record in no way discloses any specific course of conduct which defendants definitely contemplate undertaking if they register which course of conduct would bring them into conflict with any specific provision of the Act or any specific action of the Commission.

In these circumstances, an opinion by the District Court as to the validity of those provisions of the Act which in terms apply only to specified activities and transactions of *registered holding companies* and their subsidiaries would have been "an advisory decree on a hypothetical state of facts." *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 325; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 354–355.

II. Even if the cross-bill involved some semblance of a controversy with what the defendants designate as the "control" provisions of the Act, that controversy could not be between defendants and any individual cross-defendant. The defendants—no matter what their grievances may be against the Congress or the Act—have no controversy with the individual cross-defendants. The defendants are not registered companies, and the cross-defendants have no authority to enforce, and have not threatened to enforce, any provision of the Act against them other than sections 4 (a) and 5 (R. 2249–2251); and the defendants have so stipulated (R. 271–275). Individual officers are legally

responsible for their own acts, but they are not responsible for the existence of statutory provisions which they have not threatened to enforce. And this is true whether the proceeding against them is for an injunction (*Ex parte La Prade*, 289 U. S. 444) or for a declaratory judgment (*Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288). Suits against government officers do not exist *in vacuo*. If they are not to fail as suits against the sovereign, they must be personal suits against the individual sued and based upon particular conduct of that individual. This Court has always so held. *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *In re Ayers*, 123 U. S. 443; *Ex parte Young*, 209 U. S. 123; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70; *Ex parte La Prade*, 289 U. S. 444.

III. Even if the cross-bill involved some semblance of a controversy between the defendants and the individual cross-defendants, still defendants were not entitled to relief on the cross-bill since they failed to prove any damage, present or threatened, irreparable or otherwise. The record contains no evidence whatsoever of any such damage (R. 2250–2251). A court of equity cannot properly entertain a cross-bill to determine the constitutionality of a statute of the character involved in this cause where there is no proof of damage, present or threatened, irreparable or otherwise. And this is equally true whether the cross-bill seeks an injunction (*Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Moor* v. *Texas & New Orleans R. Co.*, 297 U. S. 101) or a

declaratory judgment (*Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. (2d) 97, 100 (C. C. A. 5th, 1936), *cert. den.*, 299 U. S. 559). "The statutory grant of jurisdiction leaves open the question of the propriety of its exercise." *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 480.

IV. There is a further defect in the cross-bill. It is not interposed as a defense to the registration provisions, but is filed to contest other provisions of the Act on the assumption that the defendants are legally bound to register. The defendants—having failed to register in order to avoid any possible application to them of provisions of the Act relating to registered companies—have taken the law into their hands and must now abide the consequences. Until defendants have absolved themselves of their unlawful conduct by compliance in good faith with sections 4 (a) and 5, they are not entitled to affirmative relief under the cross-bill. The defendants do not seek equity with clean hands.

ARGUMENT

PART I. THE BILL AND ANSWER INVOLVE SOLELY THE VALIDITY OF THE REGISTRATION PROVISIONS

The plaintiff's bill seeks only to enforce the registration provisions of the Act. By its terms the bill puts in issue solely the power of the Congress to require the defendants to register under section 5, as a condition precedent to their continuing to engage in certain activities in interstate commerce

and the mails, enumerated in section 4 (a).[17] The decree of the District Court was confined to that one issue. The decree did not purport to bind any of the defendants to observe any other provision of the Act, but to the contrary expressly provided that it was without prejudice to any right defendants might have regarding the rest of the Act (R. 2264).[18]

To defeat plaintiff's bill, defendants must establish the defense that they are not legally bound to comply with the registration provisions. Defendants cannot successfully assert as a defense the alleged invalidity of some other provision or provisions, which are not applicable to them but only to registered companies, unless they can show that the

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[17] Section 4 (b) is not involved in this proceeding and, therefore, has not been considered by either court below. It is the Government's position that defendants are violating section 4 (a) and must register as required by that section. If, as we show and as both courts below held, defendants are required to register by section 4 (a), it would have been academic to determine whether they might also be required to register by section 4 (b).

[18] Defendants' opening statement of facts (brief, p. 7) describes the instant proceeding as a suit to compel "subjection" to the "Act," rather than to the registration provisions; and attributes to the Government the position that, because the registration provisions are valid, "the defendants may, therefore, be required to submit to the entire Act without any determination as to the validity of the control sections" (brief, p. 8). It does not seem possible to put any meaning upon these assertions which would save them from being categorical misstatements. The defendants are here placing a wholly unwarranted construction upon the Act (see pp. 49–52, *infra*), and then ascribing that construction to the Government.

registration provisions are in some way inseparable from such other provisions and therefore incapable of judicial examination and enforcement apart from such other provisions.[19]

Defendants do not question this proposition, but assert that the registration provisions are inseparable from the other provisions of the Act and that, therefore, the alleged invalidity of such other provisions serves as a defense for their failure to register. To support their contention of inseparability, defendants make two wholly different arguments, without distinguishing between the two. First, they assert that the registration provisions are inherently and structurally inseparable from the rest of the Act and that the entire Act must fall as a whole if any part is invalid. Second, they contend that even if the Act is not an inherently inseparable whole, still the registration provisions are inseparable in the sense that standing alone they would be too fragmentary for the Congress to have intended them

[19] The contention of the defendants that they have a right before they register to set up, by way of *cross-bill*, the invalidity of provisions of the Act other than sections 4 (a) and 5, even though such other provisions could not be set up by way of *defense*, will be considered in Part III of the Argument (pp. 204–250, *infra*). Here we are concerned only with the alleged right of the defendants to set up, by way of defense for their failure to register, the alleged invalidity of provisions which the Commission's bill does not attempt to apply to defendants, which in fact are not presently applicable to them, and which will not become applicable, if at all, until they do register.

to remain operative if all the rest of the Act should fail. As the Government will show, and as both the District Court (R. 2252–2253) and the Circuit Court of Appeals (R. 2332) ruled, the registration provisions are not inseparable in either sense. To the contrary, the registration provisions are not only capable of separate operation and enforcement, but accomplish enough to justify their continued enforcement even if the provisions of the Act which go beyond regulation by the informatory process should fail. Moreover, if the registration provisions are capable of separate operation and enforcement, defendants are in no position to assert, *before* the other provisions of the Act have become the subject of actual controversy, much less before they have been adjudged unconstitutional, that the registration provisions are too fragmentary to stand alone. Until the other provisions of the Act become the subject of actual controversy, their constitutionality must be presumed.

I. THE REGISTRATION PROVISIONS ARE NOT INHERENTLY INSEPARABLE FROM THE OTHER PROVISIONS OF THE ACT

Section 32 expresses in broadest terms the intention and desire of the Congress that the provisions of the Act should be separable. While it is true that section 32 is not an "inexorable command" to preserve valid fragments of the statute if its warp and woof are torn away (*Dorchy* v. *Kansas*, 264 U. S. 286, 290), it does create "a pre-

sumption that, eliminating invalid parts, the legislature would have been satisfied with what remained." *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 235. *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 186; *Lynch* v. *United States,* 292 U. S. 571, 586; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 334–335.[20]

The trial court expressly stated: "I cannot find that defendants have overcome the separability presumption created by sec. 32" (R. 2188; see also, R. 2223, finding 15). Indeed, there is nothing in the record or in the Act to which the defendants can point in their effort to upset the deliberate findings of the trial court that the registration provisions are "separate and separable." As the trial court found, the intention of Congress that the provisions of the Act be separable is apparent throughout the Act and is affirmatively evidenced not only by section 32, but by "the statement, in section 1 of the Act, of the purposes and policy of the Act; the form and draftsmanship of each of the provisions of the Act; the legislative history of the Act; and the purposes served and ends accomplished by the several provisions of the Act" (R. 2222, finding 14).

[20] Defendants are without warrant in asserting (brief, p. 56) that the "plaintiff's theory, endorsed by Judge Manton," is that "the separability clause is a command to sustain a particular section though the 'warp and woof are torn away.'" The Government has never so contended; and defendants are here seizing upon an obvious typographical error in Judge Manton's opinion (R. 2332) in order to discredit the Government's valid argument.

A. COMPLIANCE WITH THE REGISTRATION PROVISIONS DOES NOT PREJUDICE THE RIGHT OF A REGISTRANT TO CONTEST THE OTHER PROVISIONS OF THE ACT

In their pleadings and arguments defendants contend "that registration * * * would prejudice defendants' rights to attack the validity and constitutionality of the Holding Company Act" (answer, R. 184); that "once having registered, the holding company and its subsidiaries cannot escape plenary control by the Commission" under the other provisions of the Act (brief before Circuit Court of Appeals, pp. 12–13); and that "4 (a) is not merely a penalty for failure to register; it is the trigger by means of which a trap is sprung from which there can be no escape except by the death of the holding company or its transmigration" (brief, p. 37). The premise of this contention of inseparability is that registration would bind a registrant to observe all the provisions of the Act applicable to registered holding companies; and the conclusion is drawn that if any such provision is beyond the power of the Congress, the requirement of registration, as well as all the rest of the Act, is unconstitutional.

The premise is false. Registration does not deprive the registrant of the right to contest the validity of any provision of the Act if and as such provision impinges upon his constitutional rights. Furthermore, as the District Court explicitly stated: "Any doubt as to this is clearly dispelled

by a rule of the Commission, issued pursuant to its rule-making power under the Act, which permits registration with an express reservation of any constitutional or legal rights and further provides that if such reservation shall be judicially adjudged invalid, the registration shall be voidable at the option of the registrant" (R. 2179; see also R. 2253, conclusion 2). This rule of the Commission is printed in full in the record at page 649.

Clearly, then, the Commission's demand that defendants register does not, and could not, constitute a demand that defendants comply with, or in any manner subject themselves to, the other provisions of the Act. The defendants' contention that registration involves an irrevocable submission to the other provisions of the Act or to control by the Commission under those other provisions is frivolous and without color of merit. The District Court properly concluded that "compliance by any defendant with sections 4 (a) and 5 of the Act will not waive or impair any constitutional, legal, or other right of such defendant under any other provision of the Act" (R. 2253, conclusion 2). There is no authority to the contrary.[21] The decisions of this

[21] Five other federal courts have considered the same contention, and all five have reached the same conclusion. Judge Coleman, in *In re American States Public Service Co.*, 12 F. Supp. 667, 689 (D. Md. 1935); Judge Holly, in *Matter of Public Utilities Securities Corp.*, N. D. Ill., decided November 27, 1935; Judge Way, in *Public Utility Investing Corporation* v. *Utilities Power & Light Corp.*, E. D. Va., decided December 17, 1935; Justice Bailey, in

Court make it perfectly clear that, even in the absence of the express reservation of rights provided for in the Commission's rule, registration would neither waive nor impair any constitutional right.[22]

It is important to recognize that the Holding Company Act does not purport to give registrants privileges which they did not previously enjoy. This statute does not confer benefits upon some applicants and deny them to others, as did the statute considered in *American Bond and Mortgage Co.* v. *United States,* 52 F. (2d) 318 (C. C. A. 7th, 1931), *cert. den.,* 285 U. S. 538 (license under Federal Radio Act); nor does it purport to confer special privileges upon companies electing to comply with its provisions, as did the statutes considered in *Wall* v. *Parrot Silver & Copper Co.,* 244

North American Co. v. *Landis*, Sup. Ct. D. C., decided January 6, 1936, modified on other grounds, *Landis* v. *North American Co.*, 299 U. S. 248; Judges Parker, Northcott, and Soper, in *Public Utility Investing Corporation* v. *Utilities Power & Light Corp.*, 82 F. (2d) 21 (C. C. A. 4th, 1936).

[22] *Union Pacific R. Co.* v. *Public Service Commission*, 248 U. S. 67 (corporation's application for an acceptance of state certificate authorizing issue of bonds is not a waiver of its right to contest the constitutional authority of the state to impose a charge for the certificate); *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490 (foreign corporation obtaining permission to do business within a state does not waive right to contest the constitutionality of state statute subjecting it to suit in any county of state); cf. *Terral* v. *Burke Construction Co.*, 257 U. S. 529 (a state may not, as a condition precedent to permitting a foreign corporation to do business within the state, exact a waiver of the constitutional right to sue in federal courts).

U. S. 407, 411 (statutory appraisal for benefit of dissenting shareholders), and *Grand Rapids & Indiana R. Co.* v. *Osborn,* 193 U. S. 17, 29 (conditions in state incorporation law); see also *St. Louis Malleable Casting Co.* v. *Prendergast Construction Co.,* 260 U. S. 469.

All companies whose business requires them to do the acts enumerated in section 4 (a) are obliged to register if they continue in business. Registration is a regulatory requirement and not a matter of voluntary election. Cf. *Booth Fisheries Co.* v. *Industrial Commission,* 271 U. S. 208, 211 (Wisconsin Workmen's Compensation Act); *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581, 598. The Commission, therefore, cannot deny registration to any company which comes within the terms of section 4 (a). In these circumstances it is carping to assert that registration under the Act could even by remote possibility prejudice the later assertion of any constitutional right.[23]

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[23] It is significant that when the Holding Company bill was introduced in the Congress, the registration provisions required the form of registration to include an "*agreement*" by the registrant to comply with the provisions of the Act and the regulations thereunder. S. 1725, United States Senate, 74th Congress, 1st Session; H. R. 5423, House of Representatives, 74th Congress, 1st Session. The agreement, however, was to contain an express reservation of "constitutional rights;" yet utility representatives, appearing before the Congressional committees, objected to the inclusion of any form or language of agreement in the registration statement because they did not wish registration to involve any voluntary commitment or consensual obligation. (See exhibit 8, R. 655 at 670 f. 2009; see also testimony of

B. THE REGISTRATION PROVISIONS ARE CAPABLE OF SEPARATE OPERATION AND ENFORCEMENT

The operation of the registration provisions is independent of all other provisions of the Act. If the registration provisions of the Act were adjudged invalid, it is true that nearly all other provisions of the Act would fail because such other provisions are so drafted as to be applicable only to *registered* companies and their subsidiaries.[24]

S. R. Inch, President of Electric Bond and Share Company. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on H. R. 5423, Part 2, pp. 1210–1211.) By acceding to this position and deleting the "agreement" from the form of registration, the Congress removed all doubts as to the separability and independence of sections 4 (a) and 5 from the other provisions of the Act. After this modification of the bill, there was not the slightest suggestion from any witness before the Congressional committees or from any member of the Congress that the provisions of the bill were not entirely separable from each other or that registration would waive or impair any constitutional or legal right.

[24] It is in this sense only that the registration provisions have been referred to by the reports of the Congressional committees as a "mechanism" by which companies are brought under the Commission's jurisdiction. But this is only one of two functions served by the registration provisions of the Act: First, they are in their own right a substantial and effective regulation of intercourse by means of the mails and the channels of interstate commerce in that they require certain publicity in connection with such intercourse. As informatory provisions they are independent in their operation and effect from the rest of the Act. Secondly, the registration provisions, quite apart from being a substantive regulation in their own right, serve to define a class of companies known as registered companies, just as the definition in section 2 (a) (5) defines a class of com-

But the converse is not true. The registration provisions are drafted to be operative independently of all other provisions of the Act. The invalidity of any one or more provisions of the Act applicable to registered companies has no necessary effect upon the operation or enforcement of the registration requirements of the Act or the numerous other provisions of the Act. If, for example, section 11 dealing with corporate reorganizations were adjudged invalid, there is no inherent reason why the other regulatory provisions could not be enforced as the Congress provided. And if section 13 dealing with service contracts were adjudged invalid, there is no inherent reason why the registration provisions, or sections 6 and 7 regulating security issues, or sections 8, 9, and 10 dealing with utility acquisitions, could not be administered in accordance with their terms.

Likewise, the purpose and effect of the registration provisions—regulation by the informatory process—are the same whether registration is considered as a separate statute regulating utility holding companies, or as but one part of a comprehensive statute containing many different regulations of utility holding companies. In writing the registration requirement, the Congress recognized—as it had in the Securities Act of 1933, the Securities Exchange Act of 1934, the Federal Com-

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panies known as public-utility companies. Indeed, section 2 (a) (12) expressly defines a "registered holding company" as a "person whose registration is in effect under section 5."

munications Act, the Federal Trade Commission Act, the Interstate Commerce Act, and the Pure Food and Drug Act—that the informatory process is in itself a valuable regulation of interstate commerce.[25] Cf. *Interstate Commerce Commission* v.

[25] In discussing the registration provisions as a useful holding-company regulation in their own right, the Government fully considers not only the information supplied by the "notification of registration" under section 5 (a)—the filing of which technically effects registration—but also the more detailed information subsequently required to be filed in the registration statement under section 5 (b). Indeed, in the original draft of the Act as it was introduced in the Congress (R. 670–673), the notification of registration (section 5 (a)) was a part of the registration statement (section 5 (b)). In subsequent drafts the notification of registration was separated from the registration statement solely for the purpose of simplifying and expediting the process of registration.

Even if, however, one were to consider the notification of registration required by section 5 (a) wholly apart from the registration statement required by section 5 (b), and even if it were true that the notification of registration would be inherently incapable of separate enforcement, still the District Court would have had to uphold the notification of registration if there were any one valid and separable provision of this Act or of the Securities Act or of the Securities Exchange Act along with which it might operate. Cf. *Carter* v. *Carter Coal Co.*, 298 U. S. 238; see pp. 57–58 n., *infra*. The registration statement is the provision in the Act following next after the notification of registration, and it was a part of the notification of registration during the consideration of the Act by the Congress. The very heading of section 5 is "Registration of Holding Companies." (See p. 5, *supra*.) Furthermore, the obligation to file a registration statement inevitably falls upon a company within a short period after the filing of the notification of registration. It is dependent only upon the passage of a brief interval of time, not upon any action by the Commission or

Brimson, 154 U. S. 447, 473–474; *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194, 211; *McDermott* v. *Wisconsin,* 228 U. S. 115, 131; *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232. (See pp. 69–82, *infra.*) The registration provisions impose upon holding-company systems, which engage in interstate transmission or use the federal channels of commerce to carry out financial or service transactions, the obligation to supply information concerning those systems for the benefit of investors, consumers, and the public, and of state regulatory authorities; and they impose this obligation regardless of whether a company is subject to further regulations under this Act. The registration provisions, as an effective instrument of informatory regulation, dovetail with the Securities Act of 1933, the Securities Exchange Act of 1934, and the Federal Power Act as readily as with the other provisions of the Holding Company Act. Indeed, utility representatives suggested to Congress that regulation of utility holding companies should be effected by

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the doing of any acts by the defendants. This is true of virtually no other provision of the Act. Not even a registered company can come into contact with most of the other provisions of the Act until the occurrence of additional action both on its part and on the part of the Commission. In these circumstances the requirement of a registration statement is clearly valid and supports the notification of registration whether it is considered as part and parcel of the process of registration or as a separate regulation of registered companies under the Act.

amending these earlier Acts rather than by a new statute (see p. 71 n., *infra*).

It is clear, therefore, that the registration provisions and the remaining provisions of this Act are not so interwoven that they cannot have separate operation and effect. They are in no way "mutually dependent upon one another." Cf. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 313.[26] As the Dis-

[26] There is nothing in the *Carter* case which detracts from the force of the Government's argument as to the separability of the registration provisions of the Holding Company Act (see also pp. 86–87, *infra*). And the District Court expressly so held (R. 2190–2191).

In the *Carter* case, the Government conceded that the so-called tax was not in fact a *tax* and could not be treated as such, but the Court agreed that it should be upheld as a *penalty* if it could be related as a penalty to any valid and separable provision of the Bituminous Coal Conservation Act. There is no need here to relate the registration provisions to any other valid and separable provision of the Act, because the registration provisions, unlike the tax in the *Carter* case, are a valid exercise of the federal regulatory power quite apart from the rest of the Act.

In the *Carter* case, the Court had to examine the other provisions of the Act—specifically, the code provisions in section 4, which provided that codes should be formulated embracing price-fixing and labor regulations—to determine whether there existed any valid, separable provision of the Act to which the tax could be related as a penalty for non-compliance. When it examined section 4, the Court divided on the question whether the labor and price-fixing provisions of that single section were separable from each other. The division in the Court turned not upon the *principle* of separability, but its *application* to the particular section of the statute before the Court. It is plain that the prevailing opinion was predicated on the theory that the Congress intended the producer to accept at least the essentials of both the price-fixing and labor provisions as integral and interdependent

trict Court succinctly stated: "Neither the efficacy nor the workability of the registration provisions as a regulatory device through publicity is affected by the other provisions of the Act; there is thus no essential inter-dependence between them" (R. 2191).

Certainly in light of the decision of this Court in the closely analogous and indistinguishable case of *Weller* v. *New York,* 268 U. S. 319, there should be no question regarding the separability of this Act. In the *Weller* case this Court had before it a New York statute which required theatre-ticket brokers to obtain a license to do business and provided regulations for licensed brokers, including a prohibition against the resale of a ticket at a price more than fifty cents in excess of that printed on the

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parts of a single code and that the theory of stabilization underlying the Act was neither intended to operate nor capable of operating unless the code encompassed both price and labor protection (299 U. S. at 314). The prevailing opinion regarded the code as according correlative rights to employers and employees, and the majority of the Court were of the opinion that if either group were, by reason of constitutional defects, deprived of the protection of the code, the code could have no more validity than a contract without consideration. Inasmuch as the labor provisions were found invalid, the Court held that the whole of section 4 must fall.

It is at once apparent that the provisions of section 4 of the statute considered in the *Carter* case are in no way comparable to the Holding Company Act, for none of the provisions of the Holding Company Act, operating alone, would give to any one group affected by the Act advantages free from correlative obligations contemplated by the Congress.

ticket. The licensing provision required the filing of an application setting forth such information as the comptroller might require to carry into effect not only the licensing section, but the price-fixing and other provisions of the statute. The defendant, charged with failure to obtain a license, had defended on the ground that the price-fixing section was unconstitutional. The state courts below (237 N. Y. 316; 207 App. Div. 337) apparently had assumed without argument that the entire statute could thus be brought in issue, and had held valid the price-fixing section, which applied only to licensed brokers, as well as the licensing section. This Court on appeal affirmed the conviction and sustained the licensing provision, but refused to consider the price-fixing provisions on the ground that, at least in the absence of an authoritative announcement of another view by the state court, the licensing regulation was severable and valid (268 U. S. at 325). In these circumstances it is impossible to brush aside the *Weller* case, as defendants attempt to do, on the ground that it involved a state statute. Only last term in *Sonzinski* v. *United States,* 300 U. S. 506, 512, this Court cited the *Weller* case as authority on the separability of a federal statute.[27]

[27] *Williams* v. *Standard Oil Co.*, 278 U. S. 235, relied upon by defendants, in no way overrules the authority of the *Weller* case. The statute in the *Williams* case was clearly confined "to the one subject of price-fixing" (278 U. S. at 245). Although the *Weller* case was cited by counsel in the *Williams* case, the differences between the two statutes were

As Mr. Chief Justice Hughes stated in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 322:

> When Congress states that the provisions of the Act are not inseparable and that the invalidity of any provision shall not affect others, we should not hold that the provisions are inseparable unless their nature, by reason of an inextricable tie, demands that conclusion.

C. THE LEGISLATIVE HISTORY OF THE ACT CORROBORATES THE PRESUMPTION OF SEPARABILITY

In the presence of a separability clause and the fact that the registration provisions are so plainly capable of separate operation and enforcement, it is difficult to follow defendants' argument regarding the "inherent inseparability" of the Act and the inseparable relation between the registration provisions and not any one, but *all*, other provisions of the Act. As the Government has pointed out (p. 3, *supra*), the Act contains at least five separate groups of regulatory provisions in addition to the registration provisions. The defendants' argument seems to go to the length of asserting that if any one, or part of one, of these five groups fails, the whole Act must fail. There is nothing in the Act or in its legislative history to warrant such assertion. The Act throughout bears striking evidence that it was not only the intention

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so striking that the Court did not even find it necessary to distinguish the two cases.

of the Congress that each group of regulatory provisions should be separable, but that the invalidation of any section or subsection, or even any part of any subsection, should not affect the remainder.[28] The precise points at which the parts might be severed in case of need have been clearly indicated by the Congress in drafting the statute, and no rewriting of the statute would be required in the event that one or more portions were to fail.

Senator Wheeler, Chairman of the Senate committee which reported the bill to the Senate, expressly stated on the Senate floor that the language referring to the mail power was made separable from that referring to the commerce power (Congressional Record, 74th Congress, 1st Session, p. 8396; see also Appendix A, p. 20). And when Senator Hastings, in the course of the Senate debate, asked that the phraseology "by use of the mails or any means or instrumentality of interstate commerce, or otherwise" be stricken out as adding nothing, Senator Wheeler refused on the ground that the language had been purposely used to strengthen the bill in event of constitutional attack (Congressional Record, 74th Congress, 1st session, p. 8674). The language was plainly adopted by the Congress to ensure that the statute in its regulation of acts done in the mails would be sep-

[28] The District Court in this cause clearly regarded the subsections and subdivisions of section 4 separable and accordingly did not even find it necessary to determine the constitutionality of clause (5) of section 4 (a) (R. 2207).

arable from its regulation of acts done through the channels of interstate commerce, and that its regulation of acts otherwise done would be separable both from its regulation of acts done in the mails and from its regulation of acts done through the channels of interstate commerce.

Had the Congress omitted the phraseology "by use of the mails or any means or instrumentality of interstate commerce, or otherwise," defendants would no doubt be arguing that the very omission of this language made it impossible for a court to separate the regulation of acts actually carried out through the mails or channels of interstate commerce from the regulation of acts not so carried out. No comparable language was employed in the statutes involved in the *First Employers' Liability Cases,* 207 U. S. 463, and *Hill* v. *Wallace,* 259 U. S. 44; and it was the very fate which befell those statutes which the Congress sought here so assiduously to avoid.

When the Congress took such care to make even clauses within subsections and paragraphs separable, it cannot be asserted that the Congress did not intend whole sections to be separable. Nor is there the slightest ground for the contention that the Congress did not appreciate the value of publicity as a separate means of control (see pp. 69–82, *infra*). The memorandum introduced in the Senate debates in support of the constitutionality of the Holding Company bill plainly stated: "Registration itself affords the opportunity for the col-

lection of full information regarding the holding company, and its related companies." [29] Likewise the reporting provisions (section 14) have only publicity value and are not in any way inextricably connected with the other so-called control provisions of the Act. As the defendants admit (brief, p. 65), the utility executives maintained before the Congress that the publicity provisions were so important in themselves that nothing more was required.

In the courts below, defendants sought to bolster their argument that the Act is an indivisible and inseparable whole by asserting that the Act has a single objective—the simplification and elimination of holding companies—and that without this objective the Act fails. And defendants' treatment of the legislative history of the Act (brief, pp. 127–138) indicates that this contention is still the premise of much of defendants' argument on separability. This contention was properly rejected by both the District Court and the Circuit Court of Appeals, for it is not the fact. The simplification and elimination of certain holding companies is but one of several means adopted by the Congress to accomplish the purposes of the Act—namely, "to meet the problems and eliminate the evils * * * connected with public-utility

[29] Congressional Record, 74th Congress, 1st session, p. 8402; also printed in Hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st session, on S. 1725, p. 808.

holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce" (section 1 (c)).

Even the Holding Company bill as originally introduced, which went further in the way of eliminating unnecessary holding companies than the Act as finally passed, provided *permanent* regulations for those holding companies which were to continue even after section 11 had become effective (R. 655 ff, particularly 692–693). There was never any question in the congressional debates that the permanent regulations which the bill set up were separate and apart from the provisions of section 11 dealing with simplification and reorganization. And this is even more obvious in the final Act. Counsel for the Committee of Public Utility Executives devoted several hours to explaining to the Senate committee that for this very reason section 11 might be omitted entirely without disturbing the essential operation and objectives of the Act (Hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st session, on S. 1725, pp. 402–448).

The distinction between the objective of the Act and the various means provided to effectuate that objective was fully understood by the Congress no less than by holding-company witnesses. Senator Hastings, of Delaware, a member of the Senate committee which reported the bill to the Senate, and a leader in the debate against the bill on the floor of the Senate, stated: "*The bill itself, in sec-*

tion 1 (c), makes clear that the elimination of holding companies is not one of the objects of the bill, but is merely a means of effectuating the policy of meeting the problems and eliminating the evils connected with some public-utility holding companies." [30] (Congressional Record, 74th Congress, 1st Session, p. 8682.) Similarly, in the debates in the House of Representatives, it was made abundantly clear that the Congress did not regard the so-called elimination provisions of section 11 as the sole or the primary objective of the legislation, but merely as one of the many important regulations adopted to eliminate the evils connected with utility holding companies. (See, for example, Congressional Record, 74th Congress, 1st Session, p. 10545.)[31]

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[30] Italics supplied unless otherwise noted.

[31] When one examines the history of section 11 as it was debated and amended on the floor of the Congress and in conference, defendants' argument is left without a shred of factual support. This section was at one stage very nearly omitted from the Senate bill and was present only in greatly modified form in the bill that was passed by the House and sent to conference. Senator Dieterich, of Illinois, submitted to the Senate an amendment to section 11 which had the open backing of the utility representatives and which would virtually have eliminated the provisions of section 11, to which the holding companies objected and which in this proceeding they for the first time claim to be the sole objective of the Act. That amendment failed of passage in the Senate by only one vote (Congressional Record, 74th Congress, 1st Session, pp. 9040-9053). And the bill as it first passed the House of Representatives and was sent to conference did not provide for any simplification of hold-

It is true that the debates centered on section 11. The simple explanation is that section 11 was the only provision over which there was substantial controversy. The advocates of section 11 took the position that the omission of section 11 would make it difficult if not impossible for the Commission to eliminate the holding-company evils at which the legislation was directed. But there is not the slightest evidence that even the most ardent advocates of section 11 desired the whole Act to fail if section 11 should be declared unconstitutional.[32]

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ing-company systems and greatly relaxed the provisions regarding the restriction of holding companies to integrated systems. The House thereby clearly indicated by an overwhelming majority its desire to have the remaining provisions of the bill even if it could not have section 11 (S. 2796, as amended and passed by House of Representatives, Congressional Record, 74th Congress, 1st Session, pp. 10639–10640).

Furthermore, when it was sought to send the two bills to conference for agreement, some of the members of the Senate urged that the Senate accept the House bill without a conference, because a rumor had been published in the newspapers that Senator Wheeler, the senior Senate conferee, would not accept in conference any bill which did not contain the Senate section 11. So strong was the sentiment in the Senate against losing the rest of the bill in the event that an agreement on section 11 could not be reached, that the Senate did not permit the bill to go to conference until Senator Wheeler assured the Senate that he would report back to the Senate if an agreement on section 11 could not be reached (Congressional Record, 74th Congress, 1st Session, p. 10916).

[32] In his opinion in this cause, Judge Mack wrote (R. 2187–2188): "While the legislative history of the Act thus reveals that sec. 11 was considered a very important, doubtless the most important, step in effectuating the pur-

The defendants' contention that the provisions of the Act are inherently inseparable is utterly without foundation. Not only have defendants failed to overcome the affirmative evidence of separability with which the record is replete, but, as the trial court stated (R. 2188), defendants have not even rebutted the presumption of separability created by section 32 of the Act.

The various provisions of the Act were carefully drafted so that they might operate smoothly together. But solicitude for the consistent interrelation of numerous provisions of an elaborate regulatory statute is no evidence of their inseparability.

II. THE REGISTRATION PROVISIONS ARE NOT TOO FRAGMENTARY TO STAND ALONE EVEN IF THE REST OF THE ACT SHOULD FAIL; NOR HAVE DEFENDANTS STANDING SO TO URGE UNLESS AND UNTIL THE OTHER PROVISIONS HAVE BEEN ADJUDGED INVALID IN ACTUAL CONTROVERSY

After arguing that the whole Act, including registration, is inherently inseparable and is structurally

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poses of the supporters of the bill and as such, was the object of the liveliest discussion between them and the opponents of the proposed legislation, I can find no indication that if the latter's apparently firm belief in its invalidity had been shared by the former, the registration provisions would not have been enacted as affording some, though not the fullest, measure of relief from many of the evils set forth in sec. 1 (b). The tenor of the debates seems to indicate rather that Congress intended the remainder of the statute to stand in case sec. 11 should be held invalid. See, e. g. 79 Cong. Rec. 14622 ff."

an indivisible whole (brief, p. 50), defendants shift their argument to, and confuse it with, a wholly different kind of so-called inseparability. They contend that if all the rest of the provisions of the Act should be held to be unconstitutional, the registration provisions would accomplish so little of what the Congress set out to accomplish that it is not reasonable to suppose that the Congress would have intended that the registration provisions should remain standing alone (brief, pp. 59, 61). The argument has thus been shifted from an alleged *inherent or structural* inseparability of the registration provisions, to an alleged *fragmentary* inseparability. The answer to this argument is two-fold:

First, the registration provisions are not too fragmentary to stand alone. In their own right they serve a useful purpose and constitute a substantial regulation of utility holding companies which the Congress, in order to accomplish its objectives, would have intended to be carried out alone if need be.

Second, once it be recognized that the registration provisions are structurally separable, the mere hypothesis that the Congress would not have enacted them independently cannot, in any event, give the defendants standing to attack the constitutionality of other provisions of the Act which do not affect them. Defendants seek to transform a doctrine of judicial necessity—which compels a court, *after* major portions of a statute have been adjudged unconstitutional in actual controversy, to

inquire whether the remainder ought nevertheless to be enforced—into a doctrine of needless anticipation of constitutional issues. It is significant to note that defendants themselves do not pursue the logic of their suggestion. While they make some effort to show that "the substantive regulatory system prescribed by the Act is unconstitutional" (brief, pp. 78–102), they scarcely undertake to prove that each of the numerous sections and subsections applicable to registered companies is unconstitutional. Yet it would be necessary for this Court so to hold before the question of the sufficiency of the registration provisions, standing entirely alone, would even be presented. The precipitation of issues of constitutionality in this fashion finds no warrant in the decisions of this Court.

A. THE REGISTRATION PROVISIONS ARE A SUBSTANTIAL REGULATORY MEASURE IN THEIR OWN RIGHT AND WOULD NOT BE TOO FRAGMENTARY TO STAND ALONE

The express findings of the District Court are an emphatic answer to defendants' contention that the registration provisions, although capable of separate operation and effect, would be too fragmentary to stand alone. The District Court quite properly found as a fact that "there is nothing in the Act or in the legislative history of the Act to indicate that the Congress, if it had thought that

any or all provisions of the Act other than sections 4 (a) and 5 were invalid, would not have enacted sections 4 (a) and 5 alone as affording some, if not the fullest, measure of relief from the evils and abuses set forth in section 1" (R. 2223, finding 17).

In the face of the impelling evidence in the record and the clear findings of the trial court, defendants cannot minimize the value of the registration provisions and the other reporting and publicity requirements of the Act. The defendants attack the so-called control provisions of the Act but steadfastly ignore the value of publicity as a means of control. Defendants not only ignore the substantive value of the information required by the registration statement, but avoid discussing either the value or the validity of the other reporting provisions of the Act, particularly section 14 which requires the information in the registration statement to be kept reasonably current.

The omissions are significant. And their significance is enhanced by the fact that the Committee of Public Utility Executives, representing the defendants and other holding companies, in their proposed amendments to the Holding Company bill submitted to the Congress, accepted both the registration requirements of sections 4 (a) and 5 and the reporting provisions of section 14 without material amendment (R. 668–674, 707–708). The similarity of these provisions to the publicity requirements of the Securities Exchange Act of 1934

is most striking. And for that Act the utility representatives almost without exception had high praise.[33] There was no disposition among them to question the validity or desirability of providing for the filing of information and the making of reports of the type and character required under the Securities Exchange Act. Indeed, the impression was conveyed by the utility representatives, as defendants themselves concede (brief, p. 65), that such legislation alone would go a long way to remedy the abuses which the Congress was attempting to cure.

The registration provisions in and by themselves provide full and accurate information regarding interstate holding-company systems, for the protection of investors, consumers, and the public from the abuses recited in section 1 of the

[33] Mr. Inch, president of Bond and Share, told the House Committee on Interstate and Foreign Commerce that the Securities Exchange Act was "one of the best things ever done" by that Committee (Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on H. R. 5423, Part 2, p. 1198). Mr. Wendell Willkie, one of the most active members of the Committee of Public Utility Executives, specifically recommended that all public-utility holding companies not already registered under the Securities Exchange Act be required to register with the Securities and Exchange Commission and to meet, among other things, all its registration and reporting requirements (*Id.* at 1335). See also, testimony of Counsel for the Committee of Public Utility Executives (Hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, on S. 1725, p. 419).

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Act,[44] and for the guidance of regulatory authorities, state and federal. The abuses recited in section 1 have in many instances sprung from the inaccessibility and unavailability of information about the holding company, its interests, and activities. Publicity in itself is a great deterrent to financial chicanery and abuse. The District Court has found as a fact that the regulation by publicity which sections 4 (a) and 5 of the Act would impose upon the defendants "is reasonably related to the evils and abuses sought to be corrected by the Act and will tend to mitigate, and perhaps to eliminate, at least some of such abuses and evil practices engaged in by public-utility holding companies * * *" (R. 2224, finding 19). The District Court further found that the information required by section 5 to be filed with the Commission will be of value to investors, consumers, and state regulatory commissions (R. 2225, finding 21).

Defendants have not offered, nor could they offer, any evidence to refute these findings. Instead, defendants attack the registration provisions with the bald assertion that the information

[44] Congressional recognition of the efficacy of publicity as a regulation of interstate commerce is shown not only by section 5 but by section 14, which requires a registered company to file periodic reports to keep reasonably current the information originally filed under section 5. Section 22 (see pp. 149–150, *infra*) requires the Commission to make available to the public information filed not only under these sections but under other sections of the Act whenever in the public interest or in the interest of investors or consumers.

required under section 5 has no function except as auxiliary to the so-called control provisions of the Act, and is not related to the interstate business and activities regulated by the separate paragraphs of section 4 (a) (brief, pp. 60–65).[35] In answer to this contention, we ask the Court to consider in order the interstate activities for which registration is required under the separate divisions of section 4 (a) and the relation of those interstate activities to the information to be filed under section 5 and the evils and abuses which the Congress set forth in section 1 (see also, pp. 92–145, *infra*).

Paragraphs (1) to (5) of section 4 (a) provide that holding companies which carry on certain enumerated activities in interstate commerce or through the mails, must register with the Commission; paragraph (6) of section 4 (a) imposes the duty to register upon holding companies which carry on such activities through subsidiary companies which they control. Section 5 specifies the information which must be supplied by companies so required to register.

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[35] That the Congress did not enact the informatory requirements of section 5 merely in aid of its regulations in the other sections of the Act is conclusively shown by the fact that these other sections include their own separate requirements to ensure the furnishing of information which the Congress regarded as necessary for their administration (see, e. g., sections 7 (a), 10 (a), 11 (a), 13 (d), and 13 (g)). See also pp. 145–151, *infra*.

1. Sections 4 (a) (1) and 4 (a) (6).

These sections in conjunction with section 5 require registration and the filing of pertinent corporate information by holding companies which transmit or transport electric energy or gas in interstate commerce themselves or through a subsidiary company. That the federal government should be fully informed as to the financial structure and the activities of companies which control the interstate transmission of electric energy and gas in this country cannot fairly be questioned. Publicity will at least deter, if not prevent, unwholesome financial practices and arrangements which ultimately impair the credit, goodwill, and service of interstate utility enterprise.

The sections in question are not only a useful deterrent, but the direct means of obtaining imperatively needed information. Intricacy and obscurity are the most obvious characteristics of holding-company finance; and knowledge is the first necessity of any public body charged with a public duty concerning it. Such bodies include the Congress itself, which must implement and develop legislation for the appropriate control of interstate commerce in electric energy and gas; the Federal Power Commission, which is charged with the present duty of regulating wholesale rates for electric energy sold in interstate commerce; and state public-utility commissions, whose effective functioning has been notoriously hampered by legal and prac-

tical barriers to basic information concerning interstate holding-company systems (see pp. 103–104, 125m, *infra*). The Congress is the only legislative authority with assured power to obtain this information; and provisions such as those of sections 4 (a) and 5 are the simplest and most effective means of obtaining it. It is particularly appropriate that the Congress should entrust the gathering of this information to the Securities and Exchange Commission, the body which since its birth has been primarily concerned with matters of corporate finance. (See also, pp. 92–105, *infra.*)

2. Sections 4 (a) (2) and 4 (a) (6).

These sections relate to service contracts which holding companies and their subsidiaries enter into or perform in interstate commerce and through the mails. Section 5 requires information about such contracts and about the companies performing them. Service contracts are not usually negotiated at arm's-length and are frequently oppressive upon investors as well as consumers. (See, for example, Appendix B, pp. 98–101.)[36] The

[36] Defendants' contention that section 5 (b) cannot be a regulation by publicity of service-contract transactions covered by section 4 (a) (3), because section 13 subsequently prohibits existing contract relationships (brief, pp. 62–63), is a complete *non sequitur*. Section 5 (b) requires publicity not only regarding the service contracts of the registering holding company, but regarding those of its associate companies which will not necessarily be prohibited by reason of section 13. Moreover, so far as section 5 (b) might be found to require publicity regarding contracts which might sub-

illumination of the nature and character of these contracts and the true relation between the parties should do much to arrest the most flagrant abuses.

The information required by the combination of section 4 (a) (2) and section 5 will be extremely helpful to state regulatory commissions and the Federal Power Commission. Cf. *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 152–153; *Federal Trade Commission* v. *Smith*, 1 F. Supp. 247, 255 (S. D. N. Y. 1932). The harmful effect of a service contract upon the serviced operating company is greatly enhanced when the appropriate regulatory bodies cannot obtain adequate information about the company doing the servicing. In determining whether a service contract is proper or fair in its effect upon the local operating company, it is a practical impossibility for any one

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sequently be prohibited by section 13, that fact is striking evidence that the Congress clearly contemplated that section 5 (b) should remain effective even if parts of section 13 were to fail. As a matter of fact, defendants argued before the District Court that "the Act [in section 13] provides for a separate and incidental regulation of these service functions, or companies, to be separately considered. Ebasco is not a holding company, is not required to register, is not a defendant here, and the regulation of its business presents a different problem" (brief before District Court, p. 78). The defendants, of course, might now make the same argument in reference to the new American Gas and Electric Service Corporation, which recently took over the service organization of defendant American Gas (p. 215, *infra*). It is obvious that the defendants are confusing the issues raised by the registration provisions with those which may subsequently arise under other sections of the Act.

state to gather the necessary information regarding a distant servicing organization serving many companies in many different states.[37] (See also, pp. 116–128, *infra*.)

3. Sections 4 (a) (3) and 4 (a) (6).

These sections relate to security issues of holding companies and their subsidiaries distributed in interstate commerce and through the mails. The benefits and protection which will be afforded investors through the information required by the combination of section 4 (a) (3) and section 5 will be of particular importance. To appraise intelligently a security of any company in a holding-company system, an investor must have adequate information about the companies in the entire system. The availability of such information to the public prior to an offering of securities by a holding company or subsidiary company through the channels of interstate commerce or the mails, will supply a useful safeguard to the hazardous task of investment. This safeguard of information is real and not fanciful. Cf. Dodd, Amending the Securities Act (1935) 45 Yale L. J. 199, 199–201. Particularly is this so in respect of the securities of utility holding compa-

[37] Congressional recognition of the desirability of making such information available to state commissions as well as to the public is also evidenced by section 18 (g), which provides that recommendations of the Securities and Exchange Commission concerning service contracts shall be made available to state commissions.

nies and their affiliates, which have long been considered by the public, rightly or wrongly, as meriting a non-speculative investment rating. Too late has the investor discovered the difference between the securities of the regulated operating company and the securities of the unregulated holding company. The illumination of the dark corners of holding-company finance may measurably reduce for the future the great losses which utility investors have suffered in the past. (See also, pp. 128–134, *infra*.)

The suggestion that the registration provisions as a substantive regulation by publicity would be an unnecessary duplication of the Securities Act of 1933 and the Securities Exchange Act of 1934 is without foundation in fact. By no means has either the Securities Act or the Securities Exchange Act covered the field. The Securities Act requires registration only by the actual technical issuer of the securities, while the registration requirement of the Holding Company Act, dealing as it does with systems of dependent corporations under common control, imposes the requirement of registration upon the holding company controlling the actual issuer of the securities so that the public to whom the securities are offered will be fully informed regarding the corporate system of which the technical issuer is only a part. And the Securities Exchange Act (with the sole exception of an amendment requiring reports for certain securities registered under the Securities

Act) requires information only from companies whose securities are listed on a national securities exchange. It is possible to have country-wide distribution and continual trading in holding-company securities without any such listing. For example, the securities of neither Bond and Share nor American Gas are listed on a national securities exchange. They are, however, the subject of active trading as securities enjoying "unlisted trading privileges" on the New York Curb and other exchanges.

4. Sections 4 (a) (4) and 4 (a) (6).

These sections relate to acquisitions of utility properties in interstate commerce and through the mails; section 5 requires information about the holding-company system in which the acquisition occurs. Without such information, neither the consumer nor the investor in a local utility is able to judge how his interests are affected by the manipulations of a distant, and sometimes unknown, holding company. The abuses which have gone hand in hand with the unregulated acquisition of control of utility properties by holding companies in the "race for property"[38] of far-flung systems have been grievously aggravated by the secrecy in which these holding-company activities have been shrouded. It has been impossible for state regulatory bodies to discover when holding companies, through the interstate securities markets, have

[38] See pp. 137–138, *infra*.

acquired controlling interests in local operating companies, or to ascertain the nature and effect of such acquisitions of control."

The registration provisions of the Act will enable state commissions and others to know and to judge the real owners and managers of the operating companies in their states. (See also, pp. 134–145, *infra*.)

5. Sections 4 (a) (5) and 4 (a) (6)

These sections in conjunction with section 5 require information about holding companies and their subsidiaries doing business in interstate commerce. The mere illumination of the inter-corporate relations of such companies should be a potent influence in eradicating serious abuses which exist in some systems, and in dispelling suspicions which may unjustly be prevalent regarding the activities

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[89] Senator Brown, a member of the Senate committee which reported the Act and a former member of the New Hampshire Public Service Commission, in the course of the debate on the Act, brought out clearly the difficulties encountered by state commissions: "Our commission could never even be certain as to the number of holding companies doing business in the State, because it is almost impossible for a State commission to discover the holding company or companies controlling an operating company, providing the representatives of the controlling company are not disposed to divulge the truth of the matter. More than once have I seen the person in charge of an operating company claim and insist that he did not know where the company was located which was over him; did not know the name of his boss; and did not know where he lived" (Congressional Record, 74th Congress, 1st Session, p. 8706).

of other systems. Such information, furthermore, is indispensable for the intelligent implementation of existing federal and state legislation, as well as for the development of future legislation.

Without such information the federal government cannot judge the purpose and effect of holding companies' control over operating companies; or learn for what purposes the channels of interstate commerce are being used, to what extent the holding company and its construction and equipment subsidiaries are engaged in interstate trade with operating companies, and to what extent such trade interferes with the free flow of competition in interstate commerce.

Without such information it is impossible for a state to ascertain whether its local operating companies are purchasing services, supplies, and equipment at arm's length. It is no easy matter for a single state to determine whether there is an interlocking relationship between a distant holding company, two or three rungs above the operating company, and the seller from which the operating company is buying equipment, or to determine whether both seller and operating utility are under substantially common control; even if the local operating utility is cooperative, the management may not have available the necessary information.

In their own right, therefore, the registration provisions are a very substantial utility holding-

company regulation; and they are not made the less so by the fact that the Congress further enacts other and different regulations for utility holding companies, whether the enactment be in one composite statute or in a series of statutes. The Congress placed the Holding Company Act in the hands of an existing agency which was already actively concerned with the intricate corporate and financial affairs covered by the Securities Act of 1933 and the Securities Exchange Act of 1934. Even if all other provisions of the Holding Company Act were to fail, therefore, the question whether the Congress could have intended to build up an elaborate administrative machine to administer only the registration provisions would never arise. Moreover, the registration provisions, quite apart from any other regulation in the Holding Company Act, are not fragments standing alone in the field of federal regulation of interstate aspects of corporate finance. Together with the Securities Act and the Securities Exchange Act, they are the result of Congress' intent and efforts to secure to the public ever greater information and light on the complex corporate and financial affairs of the great business and industrial institutions of this country.

B. DEFENDANTS CANNOT ATTACK PROVISIONS OF THE ACT NOT OTHERWISE IN CONTROVERSY MERELY TO SHOW THAT THE REGISTRATION PROVISIONS WOULD BE TOO FRAGMENTARY TO STAND IF SUCH OTHER PROVISIONS WERE INVALID

The argument that the registration provisions are inseparable from the other provisions of the Act because they would be too fragmentary to stand alone if the rest of the Act failed is quite different from the argument that the registration provisions are inherently inseparable from the rest of the Act. It is true that the courts may refuse to preserve valid fragments of a statute *after* the warp and woof of the statute have been torn away. But courts have never refused to enforce valid fragments of a statute *before* any judicial necessity has arisen for tearing away the warp and woof. And if the registration provisions be not, as they clearly are not, intrinsically and inherently inseparable from the other provisions of the Act, defendants cannot assert that they are too fragmentary to stand alone unless and until the rest of the Act has in fact been struck down in actual controversy.

In asking this Court to invalidate all the other provisions of this Act so that the registration provisions would have to be viewed standing alone, defendants are seeking an adjudication upon provisions which are not applicable to them and which do not now affect them. "Courts have no power to consider in isolation and annul an Act of Congress on the ground that it is unconstitutional." *Alabama Power Co.* v. *Ickes,* Nos. 84 and

85, October Term 1937, decided January 3, 1938; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488; *Adkins* v. *Children's Hospital*, 261 U. S. 525, 544. Courts merely refuse *in an actual controversy* to enforce a statute when the statute is shown to encroach upon constitutional rights of a litigant before the court. A legislative act is presumed to be constitutional until in an appropriate judicial controversy it is adjudged otherwise.

This Court has many times reiterated the proposition "that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of." *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226; *Heald* v. *District of Columbia*, 259 U. S. 114; *Yazoo & M. V. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217. The defendants "are not the champions of any rights except their own." *Henneford* v. *Silas Mason Co., Inc.*, 300 U. S. 577, 583.[40]

It follows, therefore, that for the purpose of the controversy presented to the District Court by the

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[40] "One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. *Lehon* v. *Atlanta*, 242 U. S. 53, 56; *Smith* v. *Cahoon*, 283 U. S. 553, 562. He should apply and see what happens" (*Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 616–617). *A fortiori*, one who is required to register should not be heard to complain in advance of obligations which may subsequently be imposed upon him. He should register and see what happens.

bill and answer, the provisions of the Act other than the registration provisions must be presumed valid. Those other provisions have not yet failed, and the District Court need not, and could not, have determined "how far it may sustain an act that partially fails." *Hatch* v. *Reardon,* 204 U. S. 152, 161. This Court need not speculate now as to what might be the situation if the provisions of the Act other than sections 4 (a) and 5 had already failed (see *El Paso & Northeastern R. Co.* v. *Gutierrez,* 215 U. S. 87).[41]

The proposition that defendants apparently espouse would make it the duty of a court to examine every provision of an allegedly inseparable statute in order to determine, not whether a particular provision sought to be enforced against a litigant is constitutional, but whether—granted the constitutionality of the particular provision immediately in controversy—there are a sufficient number of other valid provisions so as to make worth while the enforcement of the valid provision in controversy. No such proposition has ever been recognized.

[41] This statement is subject to the possible qualification that if, contrary to the ruling of both the lower courts, the District Court should not have dismissed the cross-bill, but should have found that it properly presented controversies regarding all of the other provisions of the Act and should have found virtually all of those other provisions unconstitutional, then the District Court might properly have considered whether enough of the Act was left to stand alone.

Defendants' contention finds no support in *Carter* v. *Carter Coal Co.*, 298 U. S. 238. In that case there were two questions of separability involved. The first question of separability related to the tax provision. It was conceded by the Government that the so-called tax was not capable of separate administration and enforcement because as a tax it was invalid, and as a penalty it was dependent upon the existence of one or more valid and separable provisions to which as a penalty it could be related. The second question of separability related to the code provisions. The question was whether the price-fixing provisions were capable of enforcement and administration separate from the labor provisions. A majority of the Court concluded that they were not because standing alone without the wage provision they accomplished, not simply something less than, but something different in purpose and effect from, what the Congress intended (see pp. 57–58 n., *supra*). There is nothing in any of the opinions in the *Carter case* to suggest that if the tax had been sustainable as a tax, or if the price-fixing provision had not, in view of the majority of the Court, been integrally tied up with the wage provision, the Court would have permitted the coal producers to plead as a defense to a suit for collection of the tax the invalidity of any regulatory provision not itself the subject of actual controversy. The Court's willingness to examine

the entire statute in search of a valid separable part is far from connoting a similar willingness to explore an entire statute for the purpose of discovering one or more allegedly invalid parts.

The *Carter* case, of course, did not enunciate a doctrine contrary to that announced by this Court during the same term in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288—namely, that a court considers only that part of a statute which is necessary to resolve the particular controversy before it (see pp. 232–233, *infra*).

The precedents cited in the margin [42] make it clear that the defendants cannot, as an excuse and

[42] In *Yazoo & M. V. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, the question before this Court was the validity of a statute requiring common carriers to settle claims for lost or damaged freight within a specified period or become liable to a penalty of $2,500 in each case. It was argued that the statute was invalid because it was not confined to cases like the case then before the court, where the claim was admittedly correct and reasonable, but would equally apply to penalize a railroad's failure to accede to an excessive or extravagant claim. But Mr. Justice Van Devanter stated for the Court (226 U. S. 219–220): "Of course, the argument to sustain the contention is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto.* But this court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and *how far parts of it may be sustained if others fail are matters upon which we need not speculate now. Hatch* v. *Reardon,* 204 U. S. 152, 160; *Lee* v. *New Jersey,* 207 U. S. 67, 70; *Southern Railway Co.* v. *King,* 217 U. S. 524, 534;

as a defense for their failure to comply with the registration provisions, assert the alleged unconstitutionality of other provisions of the Act which have no present application to these defendants, provi-

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Collins v. *Texas*, 223 U. S. 288, 295; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550."

In *Heald* v. *District of Columbia*, 259 U. S. 114, the plaintiffs, owners of *property within the District of Columbia*, attacked the constitutionality of a District of Columbia statute taxing property both within and without the District, on the ground that the statute would be invalid in its attempt to tax *property outside of the District*. Plaintiffs contended that the statute was inseparable and if invalid in part it was void *in toto*. There was no question that the statute was applied to the property of the plaintiffs, all of which was located within the District, was valid. And this Court rejected plaintiffs' argument (259 U. S. at 115) that, if the provisions of the Act were inseparable, plaintiffs were in a position to attack the validity of that part of the statute which was inapplicable to them in order to nullify that part of the statute which was applicable to them. In confirming the dismissal of the taxpayers' suit, Mr. Justice Brandeis said for the Court (259 U. S. at 123): "It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him. In no case has it been held that a different rule applies where the statute assailed is an act of Congress; nor has any good reason been suggested why it should be so held. Compare *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 73; *Straus* v. *Foxworth*, 231 U. S. 162, 171; *Fairchild* v. *Hughes*, 258 U. S. 126."

During the last term of this Court, the Alabama Unemployment Compensation Act was sustained against an attack by employers who pleaded, in part, that the Act was unconstitutional because of the tax which it imposed upon employees. *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495. The Court refrained from passing on this question

sions with which they have no controversy, provisions which do not in any way alter or affect the application of the registration provisions to them. And this is certainly true where, as in the present case, even if the other provisions of the statute were to be or had been eliminated, the sole argument against the registration provisions would be, not that standing alone they are *so different in their purpose and effect from what the Congress intended* that they must fail, but simply that standing alone they are *too fragmentary or unsubstantial* for a court to assume that the Congress would have been satisfied that they remain.

In such circumstances, a court will not hear objections to the constitutionality of a law from those who are not themselves affected by the alleged unconstitutionality in the feature complained of. The invalidity of the registration provisions themselves is the only defense which at any time has been, or which can now be, available to the defendants as a defense for failing to register.

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The numerous provisions of the Act are clearly susceptible of separate operation and enforcement. The defendants will have their day in court to contest any provision of the Act in the orderly manner

upon two grounds—one, that the employers could not "object to a tax which they are not asked to pay," and two, that the tax upon employees was separable from the remainder of the Act (301 U. S. at 513). Both grounds are applicable with equal force in sustaining the District Court's restriction of the issues in the instant cause. See also, *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 614, 616–617.

provided by the Congress in the Act itself before any provision may be enforced in violation of their constitutional rights. More, the Constitution does not require. More, equity will not allow.

Part II. The Registration Provisions of the Act Are Constitutional

The defendants contend that the registration provisions of the Act,[43] even though recognized as constituting a separable regulation by the informatory process, infringe rights guaranteed by the Federal Constitution. They assert primarily that these provisions are in excess of the powers of Congress to regulate interstate commerce and the use of the mails (see pp. 91–181, *infra*); but further contend that they constitute a deprivation of their property without due process of law in violation of the Fifth Amendment (see pp. 182–193, *infra*); and that they unlawfully delegate to the Securities and Exchange Commission powers which can only be exercised by the Congress itself (see pp. 194–204, *infra*).[44] To the questions thus raised the present section of this brief is devoted.

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[43] Both Judge Mack in the District Court and Judge Manton in the Circuit Court of Appeals, it should be noted, limited their constitutional determination to the registration provisions of the Act. The District Court passed upon and made findings upon no other issue, although by stipulation the parties were given the opportunity to present any proof which any of them regarded as relevant. Cf. *Kelly* v. *Central Hanover Bank & Trust Co.*, 85 F. (2d) 61 (C. C. A. 2d, 1936), and subsequent proceedings in the district court, 14 F. Supp. 346 (S. D. N. Y. 1936).

[44] The defendants also suggest (brief, pp. 76–77) that section 4 (a) is a penalty of a "peculiar and unusual form," and

I. THE REGISTRATION PROVISIONS ARE A VALID EXERCISE OF THE FEDERAL POWER OVER INTERSTATE COMMERCE AND THE MAILS

The defendants' attack upon the registration provisions of the Act rests upon a paralyzingly narrow conception of the power of Congress to regulate, in the national public interest, activities in interstate commerce and the mails. It will be shown hereafter (see pp. 158–181, *infra*) that the broad as-

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as such "raises * * * constitutional doubts under the Sixth and Eighth Amendments." The simple answer is that section 4 (a) is not a penalty in any form, but the defining part of a regulation which conforms to a perfectly familiar pattern. The registration provisions of the Act have no different effect than if they read: "Any holding company which shall do any of the following acts in interstate commerce or by use of the mails [as enumerated in section 4 (a)] * * * shall file a notification of registration and a registration statement [as provided in sections 5 (a) and 5 (b)]." The penalty for violation of this regulation is provided in section 29, which, of course, is not open to the objections suggested.

The defendants' brief (p. 4) also states, without elaboration, that the case presents the question whether the registration provisions violate the Tenth Amendment to the Constitution. The Act is scrupulous to conform not only to the letter but to the spirit of our dual form of government. Far from invading any sphere of government reserved to the states or impairing the exercise of any governmental function belonging to the states, the registration provisions supplement and sustain state regulatory legislation and administration. It is significant that, in the long history of controversy over the Act—to the best of our knowledge and belief—no opposition has ever been voiced, on grounds either of policy or constitutionality, by any responsible state regulatory authority or official.

sumptions as to the limitations upon federal power, which underlie defendants' argument, are without foundation in the decisions of this Court.

An exact appreciation of the defendants' position concerning the extent of these powers, however, requires at the outset a consideration of the specific regulations of which defendants are complaining. These regulations are contained in section 5 in conjunction with paragraphs (1) to (6) of section 4 (a). Each of the paragraphs here applicable will be considered in detail.[45]

A. THE ACTIVITIES ENUMERATED IN SECTION 4 (A) ARE SUBJECT TO FEDERAL REGULATION BY THE INFORMATORY PROCESS

1. Section 4 (a) (1) in combination with section 5 is a valid exercise of the power of the Congress over interstate commerce.

Section 4 (a) (1) of the Act provides that it shall be unlawful for a holding company, *unless it registers,* "to sell, transport, transmit, or distribute, or own or operate any utility assets for the transporation, transmission, or distribution of natural or manufactured gas or electric energy in interstate commerce." Section 4 (a) (6)—to be considered immediately hereafter—applies the provision of

[45] The District Court ruled (R. 2207) that it was not necessary to consider paragraph (5) of section 4 (a), and the Government accordingly has omitted separate discussion of that paragraph.

paragraph (1), as of the other paragraphs of section 4 (a), to a holding company whose subsidiaries are so engaged in interstate commerce.

Bond and Share and each of the twelve other defendants, themselves or through one or more controlled subsidiaries,[46] are engaged on a huge scale in the transmission and sale of electric energy or gas in interstate commerce. Reference to the findings of the District Court which are summarized in the statement of facts (pp. 12–13, *supra*) will show that Bond and Share operating companies transmit annually approximately 3.7 billion kilowatt hours of electric energy across state lines, constituting approximately 25 per cent of all the electric energy transmitted in interstate commerce in the United States, and approximately 91 billion cubic feet of

[46] Defendants Bond and Share, American Gas, American Company, National Company, Electric Company, United Company, Power Securities Corporation, and Lehigh Power Securities Corporation do no interstate business in gas or electric energy themselves, but control subsidiaries which are engaged in the interstate transmission and sale of gas and electric energy (R. 2231–2234, 2236–2237, findings 32–38, 43–47; see Appendix B, pp. 122–123, 126). Defendant Utah Power & Light Company engages in an interstate business in electric energy, but has no subsidiaries so engaged (R. 2234, finding 39; see Appendix B, pp. 127–128). Defendants United Gas Public Service Company, Houston Gulf Gas Company, Nebraska Power Company, and Pacific Power & Light Company both themselves and through their subsidiaries engage in interstate transportation and sale of electric energy or gas, or both (R. 2234–2235, 2237, findings 40–41, 48–49; see Appendix B, pp. 127–128.)

natural and manufactured gas, constituting more than 20 per cent of the total interstate gas transportation in the United States.

The proposition that the Congress of the United States is powerless to exact from the companies engaged in or controlling this gigantic interstate business, information essential in the public interest, scarcely deserves to be treated with tolerance. Seldom has a constitutional issue, thought worthy of litigation in modern times, been answered so unmistakably by the express words of the Constitution: "The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *."

(1) Since Chief Justice Marshall's decision in *Gibbons* v. *Ogden,* 9 Wheat. 1, there has been no question that all forms of interstate transportation and transmission constitute interstate commerce. Until the passage of the Public Utility Act of 1935 (of which Title I is the Holding Company Act, and Title II, an amendment to the Federal Power Act), the Congress had made virtually no attempt to regulate interstate transmission of gas or electric energy. But such transmission has been involved in many cases before this Court, and the Court has frequently taken occasion expressly to call attention to "the paramount authority of Congress" to regulate the transmission, and sale for transmission, of gas and electric energy across state boundaries. *Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23, 29; *Utah*

Power & Light Co. v. *Pfost,* 286 U. S. 165, 182."[47] That such transmission, regardless of any sale, is itself interstate commerce, is clear. As this Court succinctly pointed out in *United States* v. *Hill,* 248 U. S. 420, 424: "The transportation of one's own goods from State to State is interstate commerce, and, as such, subject to the regulatory power of Congress. *Pipe Line Cases,* 234 U. S. 548, 560."[48] See also *Associated Press* v. *National Labor Rela-*

[47] This Court has so ruled in an unbroken line of decisions. *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229; *Pennsylvania* v. *West Virginia,* 262 U. S. 553; *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298; *Public Utilities Commission* v. *Attleboro Steam & E. Co.,* 273 U. S. 83; *State Tax Commission* v. *Interstate Natural Gas Co.,* 284 U. S. 41; see also, *Public Utilities Commission* v. *Landon,* 249 U. S. 236, 245; *Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23, 29; *Peoples Natural Gas Co.* v. *Public Service Commission,* 270 U. S. 550, 554; *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300; *Western Distributing Co.* v. *Public Service Commission,* 285 U. S. 119; *Dayton Power & Light Co.* v. *Public Utilities Commission,* 292 U. S. 290; *Columbus Gas & Fuel Co.* v. *Public Utilities Commission,* 292 U. S. 398.

[48] While there is no merit in the contention, made by defendants in their pleadings (R. 154–155), that interstate transportation for distribution at retail to the customers of the transporting company is not within the federal regulatory power, if the Congress chooses to exercise it, to the same extent as any other transportation across state lines, it is important to note that the contention relates to less than half the electric energy transmitted by defendants and their subsidiaries across state lines. At least half of the energy so transmitted is sold to other companies, associate and non-associate (R. 2059). Corresponding figures for the interstate gas transportation in defendants' system are not available.

tions Board, 301 U. S. 103, 128-129 (quoted 119-120n., *supra*).

Nor is there any doubt that the sale of gas and electric energy for transmission across state lines, like the transmission itself, is interstate commerce; and this is so whether title passes at the state border (*Peoples Natural Gas Co.* v. *Public Service Commission,* 270 U. S. 550; *Public Utilities Commission* v. *Attleboro Steam & E. Co.,* 273 U. S. 83), in the state of generation (*Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189), or in the state of destination (*Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298; *State Tax Commission* v. *Interstate Natural Gas Co.,* 284 U. S. 41).

Defendants and their subsidiaries, therefore, are clearly engaged in interstate commerce and subject to the federal power in respect of their transmission and sale across state lines of electric energy and gas. The Congress has the same power to regulate the activities of those engaged in interstate sale and transportation of electric energy and gas as it has to regulate the activities of those engaged in the interstate transportation of commodities by rail. Its power over the one form of interstate commerce, as over the other, is paramount. As Chief Justice Marshall stated in *Gibbons* v. *Ogden,* 9 Wheat. 1, 197, "the power over commerce with foreign nations, and among the several states, is vested in congress *as absolutely as it would be in a*

single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

(2) The great increase in interstate transportation and transmission of gas and electric energy is a dominant feature of recent developments in the utility field and may be expected to continue at an accelerating rate in the future. In the Public Utility Act of 1935 the Congress recognized that financial as well as operating problems in this field could no longer be ignored.

The Holding Company Act is not concerned with the rates or other operating practices of persons engaged in the interstate transmission of gas or electricity. That is the province (in the case of electricity) of the Federal Power Act (Title II). The Holding Company Act is concerned only with the financial practices of such persons, and then only when the persons in question are holding companies. The defendants seek to suggest, atmospherically, that because the Act thus delimits its area of special concern within the larger field of interstate transmission of gas and electricity it ceases to be within the competence of the Congress. The proposition needs only to be stated explicitly to be refuted.

The prescription of rates is not the only method available to the Congress to protect the channels of interstate commerce from abuse; nor need all possible methods of protection be comprehended

in a single enactment. The Congress can prevent the monopolization of interstate transmission lines and interstate pipe lines by a few large holding-company systems. *Northern Securities Co.* v. *United States,* 193 U. S. 197, 343.[49] The federal power to regulate security issues and acquisitions of interstate railroads as a means of protecting their credit and promoting their service has never been questioned; and equally compelling considerations support a similar exercise of federal power in this analogous field of interstate gas and electric utility enterprise. Whatever corporate monstrosities a state may suffer within its own borders (cf. *Hopkins Federal Savings & Loan Ass'n* v. *Cleary,* 296 U. S. 315), the federal government need not suffer the continuance, or permit the development, of financial superstructures upon instrumentalities of interstate commerce which impair or tend to impair their credit and their effectiveness to serve both the investing and consuming public. Cf. *New York Central Securities Corp.* v. *United States,* 287 U. S. 12; *Federal*

[49] In 1929 and 1930 twenty large holding-company systems controlled 98.5 percent of the transmission of electric energy across state lines. The rise to power of the large holding company in the gas-utility industry has been no less startling than in the field of electricity. In 1932 eleven holding-company systems controlled 80.29 per cent of the total mileage of natural-gas trunk pipe lines, upon which the gas fields are almost completely dependent for the marketing of their product. Report of the National Power Policy Committee to the House of Representatives, 74th Congress, 1st Session, House Doc. No. 137, p. 4.

Trade Commission v. *Western Meat Co.*, 272 U. S. 554; *United States* v. *Reading Co.*, 253 U. S. 26; *Continental Insurance Co.* v. *United States*, 259 U. S. 156; *Transit Commission* v. *United States*, 284 U. S. 360; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61.

Transmission, no less than generation and distribution, is an integral part of a public-utility enterprise; and its cost and financial incidents, no less than the cost and financial incidents of generation and distribution, are of the utmost concern to the consuming public. When the transmission is interstate, the federal government has the same power over such transmission and its financial incidents as a state would have in dealing with intrastate transmission. *Gibbons* v. *Ogden*, 9 Wheat. 1, 197. The financial practices and corporate structure of instrumentalities of interstate transmission vitally affect the services which they render, precisely as in the case of interstate railroads. Cf. *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456. If a holding company obstructs the conduct of interstate commerce in contravention of policies which the Congress deems vital in the public interest, the offense of the holding company is not mitigated by a showing that it also obstructs a much larger amount of intrastate commerce. Indeed, the Congress may reach intra-

state activities themselves, if they burden and oppress interstate commerce, and is not bound to permit the healthy conduct of interstate commerce in gas and electricity to be impaired by any and all intrastate activities upon which those conducting that commerce may choose to embark. *Delaware, L. & W. R. Co.* v. *United States,* 231 U. S. 363, 370.

Interstate transmission is clearly within the power of the federal government to regulate, foster, and protect. Interstate transmission is no less subject to federal power because certain effects thereof may be reached by state action. Over interstate transmission itself, the states have no direct power. The limited and *ex post facto* power of the states to refuse to recognize for local rate-making purposes unreasonable charges resulting from interstate transactions between associate companies which do not bargain at arm's-length (*Western Distributing Co.* v. *Public Service Commission,* 285 U. S. 119), does not devitalize or supplant the federal power over interstate commerce. Cf. *Public Utilities Commission* v. *Attleboro Steam & E. Co.,* 273 U. S. 83. Nor does the power of the states to regulate or tax retail distribution which follows interstate transmission (*East Ohio Gas Co.* v. *Tax Commission of Ohio,* 283 U. S. 465; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Southern Gas Corp.* v. *Alabama,* 301 U. S. 148) take from the federal government its plenary power over interstate transmission (*Minnesota* v. *Blasius,* 290 U. S. 1; *Townsend* v. *Yeomans,* 301 U. S. 441).

In regulating interstate transmission, the Congress may have regard for the interests not only of the immediate purchasers at wholesale, but of the ultimate consumers. The Congress has plenary power to regulate the instrumentalities of interstate transmission to ensure that their functioning shall not cause the spread of harm to the people of other states. *Brooks* v. *United States*, 267 U. S. 432, 431–437. The Pure Food and Drug Act, for example, has as its primary purpose the protection of ultimate consumers, although the sales to them may be consummated wholly within a state and be beyond the direct reach of the federal power. Cf. *McDermott* v. *Wisconsin*, 228 U. S. 115, 131; see pp. 158–168, *supra*.[50]

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[50] Defendants are engaged on a substantial scale in the interstate transmission of gas and electric energy. At least half of the electric energy so transmitted is sold at wholesale in receiving states, partly to associate companies and partly to non-associate companies (R. 2059). Irrespective of the character of the local distribution in the state of destination, the Congress has power to adapt its regulation of interstate transmission, and the financial practices of the system so engaged, so as to protect the consumers who create the demand for interstate transmission and the investors whose funds sustain the instrumentalities of interstate transmission.

Whether the states have power to regulate local retail rates for gas and electric energy originally transported in interstate commerce only until the Congress acts, or have exclusive authority in that field, is not clear on the decided cases, and is immaterial to the issues here involved. Decisions upholding state excise taxes on the local distribution of gas (*East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U. S. 465) and electric energy (*Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165) are not conclusive (*Minnesota* v.

(3) The particular registration requirement with which this Court is now concerned involves only the right of the federal government to demand that a holding company which itself, or through a subsidiary company under its control, sells or transmits electric energy or gas in interstate commerce, shall make itself known to the Commission and inform the Commission of its activities and its interests. The manifold usefulness of such information, and the power of the Congress to demand it, ought not to have required demonstration.

Throwing light upon the dark corners of holding-company finance operates, in itself, as a corrective regulation of the instrumentalities of interstate commerce. (See pp. 71–81, *supra*.) The federal government has a right by appropriate means to safeguard the credit and good-will of

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Blasius, 290 U. S. 1; *Townsend* v. *Yeomans*, 301 U. S. 441), particularly if the pressure or voltage is not stepped down within the importing state. But whatever may be the ultimate decision on this point, the Holding Company Act does not attempt to regulate these activities.

There is nothing in *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U. S. 465, which throws any doubt upon the proposition clearly established in *The Pipe Line Cases*, 234 U. S. 548, and in the *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23—that is, that transmission across state lines is in and by itself interstate commerce. The Court in the *East Ohio* case disapproved the *Pennsylvania Gas Company* case only in so far as the earlier case had indicated that the interstate commerce continued until the ultimate distribution to the consumer, even after the gas relieved of nearly all the pressure had passed into the local supply mains.

interstate utility enterprise. The requirement of accounts and financial reports, which shall be available for disclosure, with respect both to the interstate and intrastate business of such utilities, is appropriate not only to safeguard their credit, but to protect their investors. The credit of an interstate enterprise may be dissipated in intrastate activities; the financial health of a great utility enterprise can be judged only as a whole. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456; *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232.

Information concerning holding companies operating in interstate commerce is of the utmost importance as a guide to the Congress in drafting future legislation. Furthermore, the informatory provisions of the Holding Company Act, relating to holding-company finance, supplement the corresponding provisions of the Federal Power Act, which relate only to operating-company finance; and are indispensable to illuminate the exercise of the rate-making functions of the Federal Power Commission.

The federal government beyond doubt has power to exact from interstate holding companies information needed by state utility commissions, but not within their power, legally or practically, to obtain. Although a state in a rate case may probe into the intercorporate relationship between an operating company and those

with which it deals (*United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300; *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133; *Western Distributing Co.* v. *Public Service Commission,* 285 U. S. 119; *Dayton Power & Light Co.* v. *Public Utilities Commission,* 292 U. S. 290; *Columbus Gas & Fuel Co.* v. *Public Utilities Commission,* 292 U. S. 398; *Natural Gas Pipeline Co.* v. *Slattery,* No. 230, October Term 1937, decided December 6, 1937), the state utility commission is constantly beset with difficulties in getting proof of the want of arm's-length bargaining. The state commission rarely has jurisdiction over any but the local operating company. *New Hampshire Gas & Electric Co.* v. *Morse,* 42 F. (2d) 490 (D. N. H. 1930); *Toledo Traction, Light & Power Co.* v. *Smith,* 205 Fed. 643 (N. D. Ohio 1913); *State Public Utilities Commission* v. *Romberg,* 275 Ill. 432, 114 N. E. 191 (1916).

Having taken advantage of the commerce clause to raise legal and technical barriers to effective state action (Report of the Federal Trade Commission to the United States Senate, 70th Congress, 1st Session, Senate Doc. No. 92, Part 73–A, p. 79, ff.), utility holding companies now attack not only the power of the federal government to assist the states where their power ceases, but also the power of the federal government to inform itself intelligently about those intercorporate relationships which are involved in the transportation of electric energy and gas in interstate commerce.

There is no warrant either in principle or authority for the proposition that the Congress cannot require that adequate publicity be given the affairs of a holding-company system which engages in the interstate transportation of gas and electric energy.

2. Section 4 (a) (6) in combination with section 5 is a valid exercise of the power of the Congress over interstate commerce and the mails.

Paragraph (6) of section 4 (a) makes it unlawful for a holding company, *unless it registers*, "to own, control, or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs (1) to (5), inclusive, of this subsection." The validity of paragraph (1) has been established. It is appropriate at this point to consider paragraph (6), since if that paragraph is valid in combination with paragraph (1) it is also valid in combination with any other valid paragraph in section 4 (a).

The impingement of the holding company device upon interstate commerce does not differ essentially whether the point of contact be the parent or the subsidiary. The abuses of the device necessarily affect and pervade the entire holding-company system. There is no reason which advises the regulation of holding companies themselves engaged in the interstate transmission of gas or electricity which does not equally advise the regulation of holding companies which control subsidiaries engaged in such transmission. And the same thing is true of

holding companies and subsidiaries which do the acts in interstate commerce or the mails enumerated in the other paragraphs of section 4 (a). (See pp. 116–145, *infra.*)

Implicit in defendants' whole argument is the assumption that the holding-company relationship is a means to constitutional insulation from statutory responsibility. The question is vital and far-reaching. It goes to the heart of the holding-company problem. Erection of the primary holding company creates the problem. Multiplication of holding companies, so runs the argument, may be employed *ad infinitum* to defeat its solution. A contention so subversive of orderly government solicits more than a casual answer.

No holding-company regulation can be effective if a holding company can legally insulate itself against such regulation by carrying on its activities through subsidiary companies. If statutory responsibility can be evaded by the multiplication of corporate subsidiaries, any and all holding-company regulation becomes self-defeating. If, for example, Bond and Share can avoid the duty to register which results from its servicing activities by creating, as it has recently done, a new service-company subsidiary, Ebasco Services, Incorporated, and Ebasco can avoid regulation on the ground that it is not a holding company, then attempts at holding-company regulation can result only in more, rather than less, corporate obfuscation. If a given situation is properly within the

reach of the federal government, those who control that situation by a superimposed holding-company structure must be responsible to the federal government.[81]

A holding company as defined and as regulated under the Act is not a mere stockholder in subsidiary utility companies; it is a company which actually controls subsidiary utility companies (section 2 (a) (7) and 2 (a) (8)). Stock ownership, however large, does not of itself make a company a holding company within the meaning of the Act. While a ten per cent stock ownership raises a *prima facie* presumption of control, the Act provides (section 2 (a) (7) and (8)) that the Commission, upon application by either the putative holding company or subsidiary company and upon a showing that *in fact* control does not exist, shall declare the company not to be a holding company. This procedure is not discretionary but mandatory upon the Com-

[81] The trial court found that section 4 (a) (6) is "an essential part of the regulations in section 4 (a) if such regulations are to have any effect and are not to be susceptible of ready evasion by the transfer by a holding company of all its activities to subsidiary companies" (R. 2229, finding 26). And in its opinion the District Court expressly stated (R. 2209): "Paragraph (6) is an essential part of the regulations in the registration provisions, if the other paragraphs of sec. 4 (a) are to have any appreciable effect. Without it, it is only necessary for any holding company to transfer its activities to its subsidiaries in order to escape the regulations. A good example of how this might be done is provided in the organization of Ebasco, and the transfer of its service contracts and facilities by Bond and Share to this 100% owned subsidiary."

mission, and the action of the Commission is subject to judicial review. That the administrative presumption so used in the Act offends no requirement of due process is abundantly clear. (See pp. 185–188, *infra*.)

The present question therefore is simply whether the Congress may require a holding company to register when a subsidiary company which it controls [52] carries on certain enumerated activities in interstate commerce or the mails. We think it clear

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[52] The facts set forth in the stipulation show that defendants control, and defendants admit they control, their various subsidiaries (see Appendix B, pp. 55–71). The District Court specifically found that "each of the defendants controls its respective subsidiary companies within the meaning of the Act" (R. 2226, finding 25), and further, that "the record is without evidence which would sustain a finding that any one of the defendants is not a holding company or does not control a public-utility or holding company" (R. 2226–2227, finding 25). To these findings the defendants assign no error.

The District Court further found with respect to the effect which such control has upon the activities of the subsidiary companies of the defendants (R. 2228–2229, finding 26): "It is reasonable that holding companies (and these defendants as holding companies) controlling their respective subsidiary companies within the meaning of the Act, be made responsible for the acts of such subsidiary companies. Where there is control, within the meaning of the Act, it is the holding company that in any real sense causes the activities of its subsidiary companies to be carried on. Section 4 (a) (6) of the Act is a recognition of this practical situation and a reasonable attempt, without any denial of the separateness of the corporation as such, to charge the holding companies (and these defendants as holding companies) with responsibility for the activities in interstate commerce and the mails in which they cause their subsidiary companies to engage."

that the controlling company may be regarded, so far as the power of the Congress under the Constitution is concerned, as itself engaged in the activities which its subsidiaries carry on at its behest. But the constitutionality of paragraph (6) need not be rested on this ground alone. The Congress has set down its finding in section 1 of the Act that holding-company "practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage." This legislative finding, which has abundant support in the evidence before the Congress, brings the regulation in section 4 (a) (6) squarely within the long line of decisions by this Court holding that matters which directly affect interstate commerce are, because of their relationship to and influence upon that commerce, clearly within the scope of federal power. *Northern Securities Co.* v. *United States,* 193 U. S. 197; *United States* v. *Ferger,* 250 U. S. 199; see *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 544–550.

In *United States* v. *Ferger,* 250 U. S. 199, this Court carefully stated its long-established rule. In overruling the defendant's contention that his conduct did not fall within the Congressional power because there had been no interstate shipment but only the issuance of a fictitious bill of lading, this Court stated (250 U. S. at 203):

> But this mistakenly assumes that the power of Congress is to be necessarily tested by the

> intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (*In re Debs,* 158 U. S. 564) and with a host of other acts which, *because of their relation to and influence upon interstate commerce,* come within the power of Congress to regulate, although they are not interstate commerce in and of themselves.

The corporate form is not an insulation against constitutional power; and this is not the first time that the Congress and the courts have been concerned with the regulation of holding companies. In the *Northern Securities* case, this Court held that a company which controlled competing interstate railroads directly affected the interstate commerce in which those railroads engaged and that the holding company could constitutionally be enjoined from exercising control over its subsidiaries in violation of the Sherman Act. As the possibilities of abuse in the holding-company device have become increasingly apparent, the Congress has attempted to meet the evils by appropriate legislation. The Emergency Transportation Act of 1933 (48 Stat. 217) and the Banking Act of 1933 (48 Stat. 166, 186) provide for the regulation of rail-

road and bank holding companies. In each of these instances, the validity of the regulation of the holding company may be said to depend, as in this case, upon the effect which a holding company has upon its subsidiary companies and the acts of its subsidiary companies which are themselves within the scope of Congressional power.

The question of disregarding the corporate entity is not in any way involved in this case (R. 2229, finding 26). Had the Congress merely provided that a holding company must register if it does certain acts, then a court in a given case might be called upon to decide whether it should disregard the corporate fiction when the holding company is shown to do the acts through a subsidiary company. The Congress has avoided this problem by the express inclusion in the statute of section 4 (a) (6).[33]

This is not to say that the Congress has itself disregarded the corporate entity of any company. To the contrary, the Act takes full account of the existence, separation, and protection of such entities—e. g., sections 12 and 13, which are particularly con-

[33] It is not necessary, therefore, to enter the "legal quagmire" of cases on disregarding the corporate fiction (see Ballantine, Separate Entity of Parent and Subsidiary Corporations (1929) 14 Calif. L. Rev. 12, 15). It should be pointed out, however, that because of defendants' control over their subsidiaries through stock ownership and servicing, it is not unlikely that the corporate entities in the Bond and Share system would be disregarded by the courts for certain purposes.

cerned with the relations between the holding company and its subsidiaries. The Congress has merely found that in certain situations the proper regulation of the interstate commerce and postal activities of the subsidiaries requires regulation of the "controlling" companies. In so doing the Congress has recognized that "it is with the system that the law must deal, not with its elements." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498, 523.

The express provision by the Congress in section 4 (a) (6) treating the holding company and its subsidiaries as parts of a single system in order to regulate effectively the interstate commerce and postal activities of its subsidiaries, is clearly supported by the many decisions of this Court upholding the regulation of corporate systems as a whole even in the absence of express statutory direction. These decisions have been rendered both under the anti-trust laws (*Northern Securities Co.* v. *United States,* 193 U. S. 197; *United States* v. *Reading Co.,* 226 U. S. 324), and under rate regulations of the Interstate Commerce Commission (*Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498; *Chicago, M. & St. P. R. Co.* v. *Minneapolis Civic and Commerce Ass'n,* 247 U. S. 490).[84]

[84] The decisions of this Court under the commodities clause of the Hepburn Act clearly illustrate the point under discussion. The Act makes it unlawful for a railroad to transport in interstate commerce any commodity "which it may

In many other cases this Court has held that companies, though separate entities, may be treated as a single system for certain purposes. This is particularly true in the field of state regulation of rates charged by gas and electric distributing companies. In such cases, the state often seeks to challenge the wholesale cost of gas or electricity to the local company under an interstate contract with a supply company. Although it is settled that the state cannot do this when the two companies are independent (*Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Commission* v. *Attleboro Steam & E. Co.*, 273 U. S. 83), this Court

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own in whole, or in part, or in which it may have any interest, direct or indirect * * *." When the Senate enacted this clause, it rejected an amendment specifically applying the prohibition to commodities of a company in which the railroad held stock. Because of that fact, this Court has consistently held that a holding company has such an "interest" in the commodities of its subsidiaries as is meant by the Hepburn Act only when the separate entity of the subsidiary has in fact been disregarded. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257; *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516; *United States* v. *Reading Co.*, 253 U. S. 26; *United States* v. *Elgin, Joliet & Eastern R. Co.*, 298 U. S. 492. The majority opinion in the *Joliet* case clearly indicates that the Congress could validly amend the Hepburn Act to prevent a railroad's transporting commodities of another corporation controlled by, or under common control with, the railroad, when it rests the decision on the interpretation of the statute and refers to the failure to amend the Act in the long interval since the early interpretation (298 U. S. at 500). Cf. *Natural Gas Pipeline Co.* v. *Slattery*, No. 230, October Term 1937, decided December 6, 1930.

has regularly held that the state commission is not bound by the wholesale contract rate if the contract is with a supply company in the same holding-company system, and this whether the wholesaler is in interstate or intrastate commerce. *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300; *Western Distributing Co.* v. *Public Service Commission,* 285 U. S. 119; *Dayton Power & Light Co.* v. *Public Utilities Commission,* 292 U. S. 290; *Columbus Gas & Fuel Co.* v. *Public Utilities Commission,* 292 U. S. 398; *Natural Gas Pipeline Co.* v. *Slattery,* No. 230, October Term 1937, decided December 6, 1937. In such cases, the Court expressly recognized the separate entities of the two companies, but held that the absence of arm's-length bargaining justified their being treated as parts of a single system for the purpose of rate regulation.[55]

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[55] In the *Western Distributing Company* case, Mr. Justice Roberts stated (285 U. S. at 124–125): "Having in mind the affiliation of buyer and seller and the unity of control thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that if appellant desired an increase of rates it was bound to offer satisfactory evidence with respect to all the costs which entered into the ascertainment of a reasonable rate. *Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arm's length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value.* The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair

Cleared of the confusion between the question of disregarding the corporate entity and of regulating as a single system the holding company and its subsidiaries which do acts in interstate commerce and through the mails, the defendants' objection to section 4 (a) (6) must come down to the patently fallacious argument that the "control" which they admittedly exercise over their subsidiaries has only an "indirect" effect upon the interstate business and activities of the subsidiaries. Such a contention would be a flagrant disregard of the plain meaning of words. The numerous decisions of this

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charge in part the basis of the retail rate. The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the Commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction."

Smith v. *Illinois Bell Telephone Co.*, 282 U. S. 133, is a forceful illustration of the Government's contention. There this Court held that the Illinois company (the subsidiary) was sufficiently a separate entity to make it, and not the holding company, the proper party plaintiff in a suit to enjoin the state commission's order lowering rates. But this Court also held that the holding and subsidiary companies were but parts of a single system and the state commission could properly question the fees charged for services by the parent to its subsidiary.

Court under the Sherman Act and the Interstate Commerce Act belie any such judgment."[56]

Constitutional powers are vested in the Congress to deal with actualities. Those powers cannot be defeated by legal forms. Section 4 (a) (6) is necessary to deal with economic actualities and to prevent the circumvention of the will of the Congress within its proper sphere of control over interstate commerce. As Mr. Justice Harlan stated in *Northern Securities Co.* v. *United States*, 193 U. S. 197, 349–350: "But neither a state corporation nor its stockholders can, by reason of the non-action of the State or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations * * *. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the Government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution."

3. Section 4 (a) (2) in combination with section 5 is a valid exercise of the power of the Congress over interstate commerce and the mails.

Section 4 (a) (2) of the Act provides that it shall be unlawful for a holding company, *unless it*

[56] In the instant case Judge Mack specifically found as a fact that "where there is control, within the meaning of the Act" [and each defendant was found so to control its sub-

registers, "by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company." Bond and Share and American Gas are the only defendants affected by this paragraph of section 4 (a).

The offices of Bond and Share, of its service subsidiaries Ebasco and Phoenix, and of American Gas, are all located in the State of New York. But neither Bond and Share nor American Gas has any operating subsidiary in New York. Consequently in the performance of service or construction contracts all communications and travel, between Bond and Share's or American Gas' service organizations and the subsidiary operating companies, are across state lines and are of necessity undertaken by the use of the mails and the instrumentalities of interstate commerce (R. 2204–2205, 2237–2245; see Appendix B, pp. 108–122). And of the work done in New York, a great part is preparatory to the sending of information, advice, or instruction to the operating companies in other states (see Appendix B, pp. 110–111)."[17] Bond and Share's own

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sidiaries] "it is the holding company that in any real sense *causes* the activities of its subsidiary companies to be carried on" (R. 2228–2229, finding 26).

[17] Whether or not the preparatory work antecedent to the sale of services is itself interstate or intrastate business, it is clear from *International Textbook Co.* v. *Pigg*, 217 U. S.

view of these activities—declared prior to the enactment of the Holding Company Act, in protesting state taxation in states where its subsidiaries were operating—was that all of its "services to its client companies either are rendered in New York City or constitute transactions in interstate commerce" (R. 1048). Whatever the correctness of this view as to the scope of state power (compare, e. g., *Minnesota* v. *Blasius*, 290 U. S. 1; *Townsend* v. *Yeomans*, 301 U. S. 441) we think its implications are clearly correct as to the scope of federal power.

(1) There is no warrant either in principle or authority for drawing a distinction between the power of the Congress to regulate the transmission or sale of services in interstate commerce and the shipment or sale of tangible commodities in interstate commerce.

This Court has vigorously denied the suggestion that the power of the federal government over interstate commerce is limited to the regulation of trade in tangible commodities or of the movement of tangible objects which are the subject of barter and sale. The decisions in *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *International Textbook Co.* v. *Peterson*, 218 U. S. 664; and *International Textbook Co.* v. *Lynch*, 218 U. S. 664, first clearly established that interstate commerce in-

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91, that the mere fact that such preparatory work is necessary to the performance of interstate services is not sufficient to withdraw those interstate services from the scope of federal power.

cludes commercial intercourse involved in performing services through the mails for clients in other states.

These decisions have been uniformly and unhesitatingly applied by all courts which have had occasion to determine whether the providing of services or the dissemination of intelligence through the channels of interstate commerce constitutes doing business in interstate commerce. *Furst* v. *Brewster*, 282 U. S. 493; *Fisher's Blend Station, Inc.* v. *Tax Commission*, 297 U. S. 650; *Bay City* v. *Frazier*, 77 F. (2d) 570 (C. C. A. 6th, 1935); *Federal Trade Commission* v. *Civil Service Training Bureau*, 79 F. (2d) 113 (C. C. A. 6th, 1935). The unequivocal statements of the Court at the last term in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, put the matter beyond dispute.[88]

[88] "It [The Associated Press] is an instrumentality set up by constituent members who are engaged in a commercial business for profit, and as such instrumentality acts as an exchange or clearing house of news as between the respective members, and as a supplier to members, of news gathered through its own domestic and foreign activities. These operations involve the constant use of channels of interstate and foreign communication. They amount to commercial intercourse, and such intercourse is commerce within the meaning of the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189. Interstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution. *Pensacola Telegraph Co.* v. *Western Union*, 96 U. S. 1, 9, 10; *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 279; *International Textbook Co.* v. *Pigg*, 217 U. S. 91,

(2) The contention that one may use the instrumentalities of interstate commerce in the course of business without thereby becoming engaged in interstate commerce overlooks the issue presented in this case. It is not denied that one engaged in a local business may make use of interstate facilities without withdrawing his intrastate business from state control. But it is equally incontrovertible that the use of federal channels of intercourse is not free from federal regulation, specifically applied to such use, merely because of the intrastate character of the business which precedes that use. And particularly is this true when, as here, the interstate aspects are the predominant aspects of the business.

Indeed, the conclusion dictated by the correspondence school cases indicates that these advisory, supervisory, financial, and other services performed by Ebasco, Phoenix, and American Gas constitute a *business* in interstate commerce. Such services not only constitute doing business in

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107; *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268, 276. This conclusion is unaffected by the fact that the petitioner does not sell news and does not operate for profit, *United States* v. *Hill*, 248 U. S. 420; *United States* v. *Simpson*, 252 U. S. 465, or that technically the title to the news remains in the petitioner during interstate transmission. *Pipe Line Cases*, 234 U. S. 548, 560. Petitioner being so engaged in interstate commerce, the Congress may adopt appropriate regulations of its activities for the protection and advancement, and for the insurance of the safety of, such commerce." (301 U. S. at 128–129.)

interstate commerce in the most technical sense, but they constitute a business in interstate commerce most far-reaching in its effect and influence upon the course of interstate trade and commerce. (See Appendix B, pp. 108–122.)

Whether or not these servicing activities constitute a business in interstate commerce within the meaning of section 4 (a) (5),[59] they clearly come within the federal power as specified activities carried out through the mails and instrumentalities of interstate commerce within the meaning of section 4 (a) (2). The Congress purposely avoided incorporating in section 4 (a) (2) any technical conception as to what might or might not constitute "doing business" in interstate commerce or through the mails. The Congress specified concretely and understandably the acts done in interstate commerce or through the mails which, generally speaking, it deemed important enough to justify the filing of a notification of registration and the later filing of information regarding the interests and activities of the holding company.

Section 4 (a) (2) does not apply to a holding-company contract unless it is made or performed by use of the mails or the channels of interstate commerce. As the District Court carefully held, it is not "a disguised attempt to invade the powers reserved to the states," but is "a reasonable method

[59] Whether any of the defendants come within paragraph (5) was not considered by either court below (see p. 15 n., *supra*).

under the federal commerce power of regulating the evils growing out of the service contract" (R. 2205). The defendants' far-flung business in the making and performance of service and construction contracts was built up, and is maintained, by use of the channels of interstate commerce and the mails. Only because a federal government exists are those channels open and such a business as defendants' in existence. The Constitution which created a federal government did not deny it power to deal with problems resulting from its creation. In so far as such a business as defendants' might have been created in the absence of a federal government, the states would have had power to curb its abuses. The Constitution which took away from the states that power did not fail to vest it in the federal government.

The states, it is true, have some power to meet the evil of holding-company contracts which are not negotiated at arm's-length. But the states, regardless of their theoretical rights in a rate controversy, do not have the practical and legal ability to get at the necessary and pertinent facts (see pp. 103–104, *supra*, 125 n., *infra*). In these circumstances it can scarcely be questioned that the federal government may say to the holding company which does not confine its interests and activities to a single state that if it uses the mails or channels of interstate commerce to perform contracts with local public-utility companies it must disclose what its interests, activities, and corporate

relationships are. Even a small local newspaper is obliged to do as much. *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288.

(3) The findings of the Congress that the channels of interstate commerce have been grossly abused in the making and performance of service contracts in the holding company field cannot be controverted. The trial court in this proceeding recognized and approved the findings of the Congress that "service contracts are tainted with fraud because they are entered into in the absence of arm's-length bargaining and that they are against the public interest because negotiated by restraint of free and independent competition" (R. 2202).

Service fees are charged to operating costs by the subsidiary and are reflected, as they properly should be when commensurate with the services rendered, in the rates charged to the public. Construction fees are charged either to maintenance or capital account and so also are reflected either in the rate base or in operating costs. Where a local operating company contracts in the open market with an independent service or engineering firm for these services, it has every reason to try to secure only services of which it has an actual need, and these at the lowest possible cost. But when the holding company dictates the extent of the services and the prices and fees which the operating companies must pay, the operating companies have neither the power nor the incentive to seek services at the lowest possible cost or on the most

favorable terms. When the holding company further monopolizes the function of rendering such services within its system, it not only closes the channels of interstate commerce to competition but makes any fair determination of the reasonableness of its own charges and costs impossible.[60]

As Congressman Rayburn stated in introducing the Holding Company bill in the House of Representatives:

> Few holding companies have been satisfied with the dividends that come to prudent investors in economically and efficiently conducted business enterprise. Too often they have sought through all sorts of ingenious devices to get profits fixed by themselves from companies dominated by themselves. Through intermediate construction and supply companies they have monopolized a large part of the business of their subsidiary and subservient companies. By so doing they have substantially restricted the field available to competitive enterprise for

[60] Before the advent and development of the large utility holding-company systems, there were a number of independent and competing engineering firms, such as Stone and Webster and J. G. White & Co., whose business it was to render engineering and technical services to local operating companies. But the entry of the large holding companies into this field compelled the once independent service company either to obtain control of the utility customers it served, as was the case with Stone and Webster, or to become an adjunct of some holding-company system, as was the case with J. G. White & Co. (See (1936) 49 Harv. L. Rev. 957, 959; Bonbright and Means, The Holding Company (1st ed., 1932) 117–123, 126–7.)

> supplying the needs of the utility industry and have rendered largely impossible any fair comparison of competitive costs. The industry has consequently suffered and the community has suffered even more. Holding-company officials have complained of Tennessee Valley Authority as a yardstick, but they have so managed the utility industry as to make impossible the measurement of their own performance by any private yardstick. (Hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, on S. 1725, p. 68.)

The Congress has found that the national public interest may be adversely affected when public-utility companies thus enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition, or when service, management, construction, and other contracts involve the allocation of charges among public-utility companies in different states so as to present problems of regulation which cannot be dealt with effectively by the states (section 1 (b) (2) and (3)).[61] These

[61] As Mr. John E. Benton, General Solicitor for the National Association of Railroad and Utilities Commissioners, testified before the Senate committee which considered the Act: "The evils and abuses which result from holding company control may be briefly outlined:

"First are the intercompany service contracts of one sort and another. While State commissions, under recent decisions, may restrict allowances in operating expenses to operating utilities to what the operating utility ought to pay

findings are exhaustively documented in the reports of the Federal Trade Commission and others made upon the basis of intensive investigations into this phase of utility holding-company activities. The recurring evidence of abuses of the holding company in its service relations with dependent operating companies are such as to justify the exercise by the Congress of virtually the same power over such relations as it has over situations involving fraud, deceit, or monopoly, as to which

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for services or property obtained under such contracts with affiliated companies, such State commissions often are in no position to make determination as to what is fair. To enable such determination, the holding company must keep accounts designed for that purpose. The State commissions have no power to require such accounts to be kept, or to compel disclosure of such accounts as are kept. Also the requisite examination of such accounts requires costly and extended auditing services which are often beyond the ability of the State commissions to meet from their restricted appropriations, as the chairman of this committee has pointed out this morning.

"Furthermore, while the State commission may restrict the allowances in operating expenses, the utility company may still make the full payment called for by its contract, thus depleting its resources and injuring its security holders.

"All that the State commission can do, if it finds the payment excessive, is to say that it will not recognize it as an operating expense. It has no power to say that the payment shall not be made; and the operating utility, under the control of the holding company which brought about the contract, may proceed to make the payment, and thus deplete the financial resources of the operating utility to the public injury." (Hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, on S. 1725, p. 757.)

See also (1936) 49 Harv. L. Rev. 957. 987–989.

it has exercised and this Court has sustained the widest measure of prohibition and control.

The extent to which the proved abuses of holding-company service contracts have in fact existed in the Bond and Share system is obviously immaterial to the present issue, although a reference to the Factual Summary, Appendix B, will demonstrate that the Bond and Share system has not been as free from abuse, in this and other respects, as the carefully selected extracts from the Federal Trade Commission reports, quoted in defendants' brief, might lead one to believe.[62] Reasonable regulation—certainly reasonable publicity requirements—may be imposed upon all companies, good

[62] Bond and Share has in the past made, and continues at present through Ebasco to make, large profits from service contracts (see Appendix B, pp. 98–101). No fair competitive standards of costs exist by which the propriety of profits or the reasonableness of costs can be judged. Nor is there any standard by which to gauge the necessity for or usefulness of different classes of services. Independent service organizations have for all practical purposes been excluded from competition by the large holding-company systems; and as between the different systems the services performed vary greatly both in quantity and quality. Certainly the terms of the service contracts of Bond and Share companies have not been fixed competitively; those companies are a field closed to independent service organizations. Bond and Share operating companies enter into service contracts only with Bond and Share or its servicing successor, Ebasco—except for the operating companies in the American Gas system which have similar exclusive service arrangements with American Gas. The service arrangements in the Bond and Share system are fully discussed in Appendix B, pp. 71–101, 108–122.

or bad, within the scope of federal power. A single improvident contract, moreover, may result in serious abuses and may oppress investors and consumers for years to come. There is no constitutional doctrine that confines the power of the Congress in protecting the channels of federal intercourse to protection only from inherently evil practices or repeated and habitual abuse (see pp. 158–181, *infra*). The primary purpose of a regulatory enactment is not to punish abuse but to prevent its occurrence. Registration is not a punitive but a protective requirement.

4. Section 4 (a) (3) in combination with section 5 is a valid exercise of the power of the Congress over interstate commerce and the mails.

Section 4 (a) (3) of the Act provides that it shall be unlawful for a holding company, *unless it registers,* "to distribute or make any public offering for sale or exchange of any security of such holding company, any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or to sell any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering."

In substance, section 4 (a) (3) requires a holding company to register and make available to the Com-

mission pertinent information regarding its business and activities before making a public offering, through the channels of interstate commerce or the mails, of its own securities or those of any of its subsidiaries.[63]

The unregulated public distribution of securities by utility holding companies through the mails and channels of interstate commerce has brought widespread disaster to investors throughout the country. Repeated instances discussed in the Factual Summary serve to annotate this statement (see Appendix B, pp. 11–13, 19–20, 23–24, 27–28, 34, 43–45). The excessive capitalizations represented by holding-company securities have been an obstacle in the way of rate reductions. Holding

[63] It is clear from the record and from the findings of the District Court that the defendants, having refused to register, are asserting a right as non-registered companies to make public offerings of securities whenever such offerings may and will become necessary in the ordinary conduct of their business (R. 2245–2247, findings 57–60). The Court has further found as a fact that in active years the distribution of such securities in interstate commerce and the mails through the Bond and Share service organization has involved securities of a face or par value of approximately 100 million dollars (R. 2245–2246, finding 57). And the Court has specifically found that these past activities of each of the defendants, and the allegations in defendants' pleadings, constitute threats by each defendant to violate section 4 (a) (3) of the Act (R. 2247, finding 60). The defendants have assigned no error to these findings and, indeed, have affirmatively averred that the activities forbidden by section 4 (a) (3) are essential to the normal and ordinary conduct of the business of each of the defendants and will be engaged in as their needs require (R. 159).

companies with overburdened debt structures, according to the best expert and disinterested opinion available, have not allowed their operating companies to make voluntary rate reductions to increase consumption because of the fear that a temporary decrease in revenues would result in temporary dividend reductions and that the overcapitalized superstructure of the holding company might not be able to stand even a temporary decrease in revenues. Bonbright and Means, The Holding Company (1st ed., 1932) 166–170.[64] Opposition of

[64] "But there is an even more important relation between capitalization and rates than the one which has so far been suggested. This relation concerns the influence of a company's capitalization on its voluntary rate policies. While public service commissions fix maximum rates, the companies themselves frequently initiate rate reductions in order to cultivate public good will, and also in order to develop an increased demand for their service, which will ultimately mean an increase in profits. Experience shows that there is a great difference between different companies with respect to this policy of voluntary rate reductions. Companies under a longsighted and courageous management are more daring in reducing rates than are companies with a shortsighted and timid management. This is true because the increased business resulting from a reduction in rates is seldom developed immediately. The less able a company may be to incur a period of temporary loss for the sake of a more lasting gain, the more reluctant it will be to reduce rates below the maximum fixed by the government fiat. * * *

"But with the holding company, no less than with the utility operating company, the most serious effect of overcapitalization on rates is to be found in its baneful influence on the rate-making policies of the management. When utility properties come under the control of financially top-heavy holding companies, the pressure to maintain interest and

holding-company management to equitable rate reductions has resulted in protracted and costly rate controversies. An unnecessary and unfortunate conflict between the interests of the investor and the consumer has been injected into the electric and gas utility field by holding-company finance—a conflict which is a threat to the credit and growth of the utility industry and the public's investment therein."[88]

The effort of the Congress to make available to the investor and to the public intelligible information regarding a holding-company system which is making a public offering of its securities through the mails and interstate commerce fulfills a pressing need. The public distribution of securities is the very essence of a holding company's business—a utility holding company is essentially a financing

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dividends on the inflated capital structure is simply irresistible. The management is, therefore, compelled to take the short-run point of view and to refrain from making rate reductions that a conservatively capitalized company would make in order to develop business 'for the long pull.'" Bonbright and Means, The Holding Company (1st ed., 1932) 166–167, 170.

[88] As President Roosevelt stated in a radio address delivered on April 28, 1935: "A business that loses the confidence of its customers and the good will of the public cannot long continue to be a good risk for the investor. This legislation will serve the investor by ending the conditions which have caused that lack of confidence and good will. It will put the public-utility operating industry on a sound basis for the future, both in its public relations and in its internal relations." Report of Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, Senate Report No. 621, p. 3.

and financial enterprise. In the conduct of this financial business, utility holding companies have reared pyramided financial structures which even the financial expert cannot understand or explain. The investor has been unable to understand the relation between the securities of the numerous companies within one holding-company system. His attention has not been called to the difference between the relatively well-secured obligations of the regulated operating utility company and the highly speculative securities of the heretofore unregulated financial holding company.

The trial court found as a fact that "such regulation by publicity is reasonably related to the evils and abuses sought to be corrected by the Act and will tend to mitigate, and perhaps to eliminate, at least some of such abuses and evil practices engaged in by public-utility holding companies as found by the Federal Trade Commission, the Congress, and others" (R. 2224, finding 19).

The registration requirements of section 4 (a) (3) here involved are essentially similar to the requirements for registration of securities under the Securities Act of 1933 (see pp. 77–79, *supra*, 178, *infra*). The validity of that Act has been sustained by every court which has had occasion to consider the question (see p. 165, *infra*). The only important difference between the Securities Act and the present Act is that the Securities Act requires registration on the part of the actual technical issuer of the securities, while the Holding Com-

pany Act, dealing as it does with systems of dependent corporations under common control, imposes the requirement of registration upon the holding company controlling the actual issuer of the securities so that the public to whom the securities are offered will be informed regarding the corporate system of which the issuer is only a part. While this difference, as we have pointed out (pp. 78–79, *supra*), makes section 4 (a) (3) an important adjunct to the registration provisions of the Securities Act, the constitutional basis of the two requirements is precisely the same.

If the Congress has the power to compel a holding company to register when it makes a public offering of securities directly through the mails or channels of interstate commerce, there can be little question that the Congress also has power to compel a holding company to register if it sells a security "having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering." This portion of section 4 (a) (3)—confined, as it is, to public offerings through interstate commerce and the mails—simply ensures that a holding company shall register if it makes arrangements for such a public offering with investment bankers, or other private agencies, and that it shall not by such arrangements be able to evade the Act. The arrangement with the bankers, considered alone, might be regarded as a local or intrastate trans-

action, but it is only a step in a transaction whose very purpose is the offering of the securities to the public by means of the mails and the channels of interstate commerce. Such a step in the transaction is certainly as much in the current of interstate commerce as the transactions involved in *Stafford* v. *Wallace,* 258 U. S. 495; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1; and *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420. Indeed, such banking arrangements might well be construed as a public offering through the mails or the channels of interstate commerce even in the absence of express provision. Cf. *In the Matter of Brooklyn Manhattan Transit Corporation,* 1 S. E. C. Opinions 147 (1935). Certainly it is within the power of the Congress to make its regulation of the mails or interstate commerce effective by preventing an obvious method of evasion. Cf. *Jacob Ruppert* v. *Caffey,* 251 U. S. 264; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Everard's Breweries* v. *Day,* 265 U. S. 545.

5. Section 4 (a) (4) in combination with section 5 is a valid exercise of the power of the Congress over interstate commerce and the mails.

Section 4 (a) (4) of the Act provides that it shall be unlawful for a holding company, *unless it registers,* "by use of the mails or any means or instrumentality of interstate commerce, to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate

of such holding company, any public-utility company, or any holding company."

(1) The acquisition of utility securities and assets forms the basis of utility holding-company finance.[66] The proceeds of public offerings of holding-company securities are used to finance past or future acquisitions. The great volume of holding-company finance in recent years, which brought such havoc to investors, to the industry, and to the whole country,[67] went to finance the mad scramble of giant holding companies to add to their eco-

[66] The District Court has specifically found as a fact that each defendant, or one or more subsidiary companies of each defendant, have in the past engaged in transactions of the class included in section 4 (a) (4); that they will continue to do so unless restrained; that seven of the defendants have done so in the regular and normal course of their business; and that these activities, together with the allegations in defendants' pleadings constitute threats by each defendant to violate section 4 (a) (4) of the Act (R. 2248, findings 61–62). To none of these findings of fact have the defendants assigned error. Indeed, defendants have affirmatively asserted in their pleadings that the acquisitions embraced in section 4 (a) (4) are essential to the normal and ordinary conduct of their business and will be made as their needs require (R. 159).

[67] As Congressman Rayburn stated in introducing the Act in the House of Representatives: "For the power and the tribute the manipulations of the holding company form bring to a few, the consumer pays, the investor pays, and the whole great utility industry pays. The consumer pays when holding-company managements have to exact excessive revenues from operating subsidiaries to service holding company securities issued on the expectation of such excessive revenues. The investor pays when he buys watered holding-company securities or takes them in trade for investments in operating companies which would be good investments if

nomic empires.[68] Effective security regulation becomes impossible when the acquisitions to be

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the operating companies were permitted to be prudently managed. Too much of the investor's money has gone to purchase securities of other utilities at inflated values, frequently from corporate insiders, and too little to build up the utility enterprise.

"The whole industry pays when the undiscriminating resentment of despoiled investors and consumers falls on all utilities alike, when investor distrust cuts off sources of new capital, when their holding company tributes restrain operating companies from undertaking a consumer policy of cheaper rates and greater volume which is the only hope for the progressive development of the operating industry." (Hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, on S. 1725, p. 68.)

[68] As stated in the Report of the Senate committee considering the Act: "The holding company advocates have spoken a great deal about the capital flowing into the utility industry while under the domination of the holding company. But they have made no effort to show how much of the investors' money used to purchase holding company securities ever went to build or improve utility properties. Dr. Harold G. Moulton, president of the Brookings Institution, in a recent book entitled 'The Formation of Capital,' states that very little of the money invested in holding-company securities went into productive capital. Moulton writes:

" 'The amount of securities floated by investment trust and public-utility holding companies in the years 1924 to 1930, inclusive, was as follows:

Year	Investment trusts	Public-utility holding companies	Year	Investment trusts	Public-utility holding companies
1924	$44,700,000	$246,300,000	1928	$1,026,000,000	$1,104,900,000
1925	208,800,000	401,900,000	1929	2,961,000,000	1,089,000,000
1926	96,600,000	532,900,000	1930	401,700,000	647,600,000
1927	418,700,000	883,800,000			

financed have already been consummated. Unavoidably, the interest of existing security holders is imperilled if the financing of binding commitments is frustrated. To prevent the spread of evil, evil must be exposed at its source. Cf. *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

Acquisitions are usually accomplished by the use of the mails and the channels of interstate commerce; only acquisitions so accomplished fall within section 4 (a) (4). The need for regulation of such activities has been attested by the highest authorities in the industry. Representatives of the Committee of Public Utility Executives, on which the defendants along with other holding companies were represented, appeared before the Congress and strongly urged the need of federal legislation "to prevent the race for property" and "further concentration of control;" and the amendments suggested by that Committee to the Congress (R.

"'*Such issues served to confuse the true economic picture. They added to the volume of the security offerings; but the funds procured were employed almost entirely in the purchase of corporate securities already outstanding. Instead of adding to productive capital, these financial operations merely served to multiply the number of pieces of paper (shares of stocks) constituting claims to existing properties.* Ordinarily such a diluting process might be expected to depreciate the value of each piece of paper outstanding; but owing to the fact that the money was used mainly to buy existing securities it served instead to boost their prices.'" (Report of the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, Senate Report No. 621, p. 15.)

655–731, exhibit 8) contained provisions relating to acquisitions far more sweeping than the registration provision here involved.[69]

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[69] Mr. Wendell L. Willkie, President of Commonwealth & Southern Corporation, a recognized authority and representative of the industry, went much further in his testimony before the Congressional Committees than to ask the registration of companies making acquisitions by means of the mails and the channels of interstate commerce. He urged: "I want to say this, Senator, that in connection with my suggestion about this write-up proposition, you made some reference to Mr. Insull on the floor of the Senate. I think this led to one of the abuses in the utility business, and that is one of the reasons why I suggest here that a public utility holding company hereafter ought *not* to be permitted to acquire the stocks of another public utility holding company, or of any operating company, without the consent of the Commission. I think that is a rather fundamental suggestion, and I think it goes to the correction of one of the very great abuses that did occur in the industry. * * *

"My next suggestion is to provide that (a) no public utility holding company shall hereafter acquire any of the voting stock of any public utility holding company or operating public utility company, and (b) no person or corporation other than a public utility holding company shall hereafter acquire more than 5 percent of the voting stock of any public utility holding company or operating public utility company, unless such holding company or such other person or corporation shall have first obtained the approval of a State public service commission or, if such approval is not required, of the Securities and Exchange Commission.

"I do not mind if that is stiffened up a little. It is really *to prevent the race for property.* It is in order *to prevent further concentration of control*, of which you spoke, Senator." (Hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, on S. 1725, pp. 606, 612.)

Dangerous securities flow from unsound and unwise acquisitions. New acquisitions vitally and immediately affect the relation of the holding company to its own and its subsidiaries' existing security holders, even before any new public financing takes place. The property and securities which a holding company acquires are the foundation of the business of utility holding companies; to acquire and hold together under common control various utility properties and securities is supposedly a holding company's very reason for existence. This purpose is made possible and can be financed only if the holding company is able to issue and sell through the mails and in interstate commerce its own securities to the public, thereby securing the funds with which to acquire its properties and portfolio. And these properties and portfolio must in turn supply the earnings that are to pay returns to the holding company's investors and ultimately restore their investment to them. Unless this expenditure of its investors' funds by a holding company is prudently made, and is directed toward bringing about efficiency and economy in the operations of underlying properties, those properties soon cease to support the superimposed holding-company financial structures.

The interests of consumers are equally at stake when a holding company organized in one state goes into another state and acquires utility securities and properties at prices which bear no rela-

tion to the earning power of the properties acquired, and for a purpose which is remote from considerations of sound investment.

Further, these acquisitions of utility securities and properties usually made through the mails and the channels of interstate commerce have provided some of the most significant and glaring examples of the nullification by holding companies of state public-utility control. The states have no effective means to prevent or regulate, or even promptly to learn about, the acquisition of control of local operating companies through transactions on the interstate securities markets.[70] The registration provisions will enable state commissions to know and to judge the real owners and managers of the operating companies in their states.

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[70] In the Senate debates, Senator Borah cited *New Hampshire Gas & Electric Co.* v. *Morse*, 42 F. (2d) 490 (D. N. H. 1930), as indicating the absolute necessity for the Holding Company Act, and Senator Barkley countered with an even more striking example of the impossibility for the states effectively to deal with the problem of acquisitions. The colloquy follows:

"Mr. Borah. * * * I recall that only last year a local commission in a New England State undertaking to deal with the question of rates called upon a holding company for facts and data by which the commission could be guided, and the holding company announced that it would not furnish the material, that it would not furnish the data, that it was not subject to the control of the State authority; and it was so held, and the State authority was deprived of the data which were necessary in order to enable it to conduct the business of the State properly. Somebody must have control of that company which refuses the command or the demand or the request of the State. I think probably the

(2) The growth of holding companies in contravention of sound economics and without regard for the needs of the operating industry through acquisitions, usually accomplished by use of the mails and channels of interstate commerce, is not a mere local matter. By controlling operating utility companies in many parts of the country, a comparatively few holding companies control the interstate business of those operating companies in the purchasing of equipment and of construction materials and in the general awarding of the tremendously important business and financial patronage of one

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company was justified in refusing it from the standpoint purely of the constitutional question. * * *

"Mr. BARKLEY. As an example of what the Senator is discussing I referred the other day—and I do not know whether the Senator was in the Chamber at the time or not—to a case where a State had by its legislature provided that no outside corporation would be permitted to own more than 10 percent of the stock of a utility company operating within the State.

"A holding company which desired to get control of business within a certain State, which I need not name, organized nine corporations in the State. One of them was the Mahogany Co., one was the Ashwood Co., one was the Sassafras Co., one was the Sycamore Co., and they went all through the woods to get names for these nine companies, and each one of the nine bought stock in the utility so as to evade entirely the provisions of the law in the State undertaking to protect itself against absentee ownership; and such instances may be multiplied by the hundreds.

"Mr. BORAH. I recall the illustration which the Senator gave, and it was very relevant to the discussion. * * *"
(Congressional Record, 74th Congress, 1st Session, p. 9049.)

of the country's largest industries.[71] Such concentration of control definitely affects, burdens, and restrains the fields of interstate commerce involved. The analogy of the anti-trust cases is strikingly presented in this aspect of federal regulation of holding companies. As this Court pointed out in *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 245: "It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded." Cf. *Swift & Co.* v. *United States,* 196 U. S. 375. Congressional regulations designed to root out similar evils are found in the Packers and Stockyards Act, sustained in *Stafford* v. *Wallace,* 258 U. S. 495, and *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; in the Clayton Act, sustained in *Federal Trade Commission* v. *Western Meat Co.,* 272 U. S. 554; and in the commodities clause of the Hepburn Act, sustained in *United*

[71] The National Power Policy Committee reported to the Congress: "By 1932 thirteen large holding groups controlled three-fourths of the entire privately owned electric-utility industry, and more than 40 percent was concentrated in the hands of the three largest groups—United Corporation, Electric Bond & Share Co., and Insull. Even these three systems are not totally independent. United Corporation has a stock interest in Electric Bond & Share Co. Into the latter system have been brought certain Insull properties since the collapse of the Insull empire." (Report of the National Power Policy Committee to the House of Representatives, 74th Congress, 1st Session, House Doc. No. 137, p. 4.)

States v. *Delaware & Hudson Co.*, 213 U. S. 366, *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, and *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516; cf. *United States* v. *Elgin, Joliet & Eastern R. Co.*, 298 U. S. 492. The Sherman Act does not exhaust the power of the Congress to safeguard the maintenance of conditions which insure a fair field with no favors in interstate trade.

(3) It cannot, therefore, be said that when Congress makes it unlawful for a holding company to use the mails or channels of interstate commerce to acquire utility assets or securities without filing pertinent information with the Commission, the national public interest is not vitally involved.

We are not concerned here with the control of acquisitions by registered companies made by use of the mails or channels of interstate commerce or otherwise (see pp. 61–62, *supra*). Such control is provided for by sections 9 and 10 of the Act (see Appendix A, pp. 44–46), but those sections are not involved in the instant proceeding (see Appendix A, pp. 11–13, 12n.). The sole concern here is the right of the federal government to require a holding company to register and file appropriate information before it ventures to use the federal channels of intercourse to add to its economic domain. Such activities are certainly more far-reaching in their effect on the nation than the bringing across a state line of a bottle of whiskey for one's personal use, *United States* v. *Hill*, 248 U. S. 420, or a single illicit adventure across a state line,

Caminetti v. *United States,* 242 U. S. 470. The information required of the holding company using the mails and channels of interstate commerce is no less vital in the public interest than the information required regarding the ownership, editorship, and circulation of periodicals distributed through the mails. *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288. In *Securities and Exchange Commission* v. *Torr,* 15 F. Supp. 315 (S. D. N. Y. 1936), reversed on other grounds, 87 F. (2d) 446 (C. C. A. 2d, 1937), Judge Patterson, in sustaining the constitutionality of section 9 (a) of the Securities Exchange Act of 1934, drew no distinction between the buying and the selling of a security by means of the mails or channels of interstate commerce and emphasized the fact that the defendants in manipulating the price of a stock had bought as well as sold the stock in question. As Judge Patterson stated (15 F. Supp. at 319): "It cannot be doubted that Congress may close the channels of interstate commerce * * * to such transactions in corporate securities as it has reasonably found and declared to be directly detrimental to the financial health of the public generally." (See pp. 158–178, *infra.*)

If the Congress has power to regulate the use of the mails and the channels of interstate commerce to prevent petty offenses against public morals, it certainly is not without power to regulate the use of those channels to guard against and expose financial abuses which have brought ruin to millions. There

is nothing in the Constitution which can be construed to permit the Congress to condemn the crude methods of a Ponzi but to grant to the subtler and more refined methods of holding-company finance perpetual dispensation from federal regulation.

6. The information required by section 5 (b) is in fact a regulation of the activities specified in section 4 (a).

Upon the question of the power of the Congress, in the public interest, to regulate by the informatory process the activities in interstate commerce and the mails enumerated in section 4 (a), defendants' brief joins only reluctant issue. Defendants offer a series of contentions which, if valid, would prevent this issue from arising. It is sought, in a variety of ways, to show that the registration provisions are not in fact a regulation of the activities enumerated in section 4 (a). Of course, once the separability of the Act has been determined, such a contention is untenable; and the analysis of the registration provisions which has already been made should suffice in reply to defendants' reiteration of their argument. The contentions, however, have been discussed at length in the defendants' brief. In view of the importance of accurate delimitation of the constitutional question to be decided, the Government will state the contentions consecutively and make specific reply.

(1) It is first suggested that since the prohibitions of section 4 (a) can be avoided by the filing of a notification of registration under section 5 (a), the Congress did not intend to regulate the activities specified in section 4 (a) by the filing of information under section 5 (b). This is described (brief, p. 60) as a lack of a functional relation between sections 4 (a) and 5 (b),[72] and defendants conclude that section 5 (b) is unrelated to registration and is merely "auxiliary to the control provisions of the Act, 6 to 13, inclusive" (brief, p. 59).

The conclusive answer to this contention is that sections 6 to 13 include their own separate requirements to ensure the furnishing of information which the Congress regarded as necessary for their administration (see, e. g., sections 7 (a), 10 (a), 11 (a), 13 (d), and 13 (g)).

But the argument in any event is untenable in the light of the legislative history of section 5 (see pp. 55–56n., *supra*). While it is true that registration is technically effected by the filing of a notification of registration under section 5 (a), the fact is that in the Act as originally introduced in the Congress, the notification of registration now required by section 5 (a) and the registration statement now required by section 5 (b) were combined in one registration statement. Subsequently these two re-

[72] Just why these two sections should be defective for want of any functional tie whatever when all others, according to defendants, are integrally inseparable, is nowhere made clear.

quirements were separated, but only for administrative convenience to avoid a logjam when the Act first became effective, and to give a company ample time to prepare its registration statement after it came in contact with section 4 (a) for the first time. The Congress was careful not thereby to alter the substance of the registration process. The heading "Registration of Holding Companies," which the Congress gave to the whole of section 5, indicates how closely related the Congress regarded the notification of registration under section 5 (a) and the registration statement under section 5 (b).

The Commission's administration of the registration provisions carries out this Congressional intent. Because of the thorough study and investigation necessary to prepare essential forms and rules, registration statements were not required until ten months after the Act became effective. But as soon as the initial administrative problems were met, the Commission required that final registration statements must be filed ninety days after notification of registration (see p. 8n., *supra*).

It should further be pointed out, in view of defendants' surprising assertion that section 5 (a) does not in itself constitute a regulation of interstate commerce or the mails (brief, p. 66), that the notification of registration alone serves a useful and necessary function in apprising the Commission that the holding company is engaged, by use of the mails or channels of interstate commerce, in activities within the scope of federal power.

(2) Behind the suggestion that section 5 (b) is not a regulation of the activities enumerated in section 4 (a), lies the presupposition that publicity can have a valuable regulatory function only if it precedes the first doing of any one of such activities. This assumption is wholly unwarranted. Each of the defendants is obliged to register, among other grounds, by reason of section 4 (a) (1), or by reason of section 4 (a) (1) in conjunction with section 4 (a) (6), because each of the defendants, itself or through a controlled subsidiary company, transmits electric energy or gas in interstate commerce (R. 2230–2237; see Appendix B, pp. 122, 126, 127–128). Defendants are presently engaged in such interstate transmission, and the record discloses that they will continue to be so engaged for an indefinite time in the future. In defendants' case, a registration statement filed 90 days after notification of registration will serve substantially the same purpose as if filed simultaneously with the notification of registration.

This is equally true with regard to the other subdivisions of section 4 (a) which relate to activities and transactions which the defendants have admitted that they carry on in the ordinary course of their business (R. 270, 2230) and which it is generally known that utility holding companies have frequent occasion to carry on. The information required by section 5 (b) will be just as valuable three months after notification of registration is received as at the time of registration. Defendants

Bond and Share and American Gas, which are engaged in the performance of service contracts within section 4 (a) (2) and (6), are so engaged pursuant to long-term arrangements which will undoubtedly continue in some form. All of the defendants have alleged that they are engaged and will continue to engage in the making of security sales and acquisitions within section 4 (a) (3) and (4). In such continuing situations, ninety days of grace for the filing of information makes no realistic difference in the value of that information to the consuming public or investors in securities. And once basic information is filed, there is no need that such information be refiled each time the federal channels of commerce are used.

(3) Defendants further attempt to sustain their position by asserting (brief, p. 61) that section 22 (a) does not require disclosure of the information filed and that, therefore, such information is not a regulation because it will neither protect the public nor deter abusive practices. This assertion is a perversion of the plain language of the statute.

Section 22 (a) requires the Commission to make available to the public not only registration statements filed under section 5 and periodical reports filed under section 14, but all information filed under other sections of the Act whenever in the public interest or in the interest of investors or consumers."[73]

[73] Pursuant to its authority under section 22 (a), the present rule of the Commission provides: "Unless other-

This limited discretion, as shown by express language in section 22 (a), is lodged in the Commission for the simple reason that trade secrets and processes or other material of confidential character might be filed with the Commission under one of the several provisions of the Act. In emphasizing the Commission's discretion, the defendants neglect to mention that section 22 (a) further provides that "the information contained in any statement, application, declaration, report, or other document filed with the Commission *shall be available to the public,* and copies thereof may be furnished to any person at such reasonable charge and under such reasonable limitations as the Commission may prescribe * * *."

Obviously it is true that all of the declared purposes of the Act cannot be altogether satisfied by informatory processes. But the legislative history of the publicity requirements of this statute, as well as their striking similarity to the Securities Act of

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wise directed by the Commission and subject to the provisions of rule 22B–1, all information contained in any notification, statement, application, declaration, report, or other document filed with the Commission shall be available to the public, and copies of any or all information filed in connection with or as a part of any of the above documents will be furnished to any person upon request and upon the payment of the charge therefor." Rule 22A–1, Public Disclosure of Information Filed With the Commission (Securities and Exchange Commission, General Rules and Regulations under Public Utility Holding Company Act of 1935 (April 15, 1937), p. 51; see also Rule 22B–1, *ibid.*).

1933 and the Securities Exchange Act of 1934, show that the Congress recognized, and was enacting, publicity requirements as a valuable means of regulating the activities specified in 4 (a). (See pp. 69–81, *supra.*) Section 4 (a) is not a penal but a regulatory provision; and in so far as it excludes companies from the use of the federal channels of commerce, it excludes them for their failure to register under section 5 and not for their failure to comply with any other provision of the Act. The District Court properly found that the regulation by publicity which sections 4 (a) and 5 of the Act would impose on the defendants "is reasonably related to the evils and abuses sought to be corrected by the Act and will tend to mitigate, and perhaps to eliminate, at least some of such abuses and evil practices engaged in by public-utility holding companies * * *" (R. 2224, finding 19).

(4) Defendants next urge (brief, pp. 64–66) that the requirement of information under section 5 (b), even if intended as a regulation of the interstate transactions specified in section 4 (a), is too broad because it is not confined to those transactions but may relate to intrastate activities as well. This assertion ignores the fact that registration and the information required to accompany registration can be required only from a holding company which itself or through a controlled subsidiary company uses the mails or the channels of interstate commerce to carry on the activities enumer-

ated in section 4 (a). If information is required from such a holding company concerning other companies which do not themselves use the mails or channels of interstate commerce to carry on the activities enumerated in section 4 (a), it is because those financial facts are necessary to give a true picture of the holding company, its resources, and its corporate relationships. We have amply demonstrated that in this respect it is with the system, rather than its elements, that a law such as this must deal. (See pp. 105–116, *supra*.)

Moreover, such intrastate financial arrangements and intercorporate relationships as to which information might be required, vitally affect the interstate business and activities enumerated in section 4 (a), and a full disclosure of such arrangements and relationships is necessary for an adequate understanding and appraisal of the interstate activities and their probable effects on investors and consumers. As we have shown, the requirements of accounts and financial reports from a utility enterprise in respect of both its interstate and intrastate business are appropriate not only to safeguard its credit but to protect its investors. The credit of an interstate enterprise may be dissipated in intrastate activities; the financial health of a great utility enterprise can be judged only as a whole. (See pp. 102–103, *supra*.)

(5) Defendants assert further (brief, pp. 60, 66–69), that the information required by section 5 (b) is of inquisitorial character—that the Commission

may exercise its untrammeled discretion to require any information it pleases [74]—and that the information, therefore, need have no relation to interstate commerce. The suggestion again is in the teeth of the statute.

Section 5 (b), like any other provision of the Act, must be interpreted and administered as the Congress expressly provided, to meet the problems and eliminate the evils enumerated in section 1—specifically, problems and evils connected with utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce. If and when, and not before, the Commission should seek to require information not related to the acts enumerated in section 4 (a) and having no bearing upon the problems and evils set forth in section 1, its authority may be questioned. At least in this case, the defendants' proposition that the "Congress is without constitutional authority to grant inquisitorial powers to any agency unless they are to be exercised in aid of one or more of the constitutional powers of the federal government" (brief, p. 69) is irrelevant. The informatory requirements of section 5 (b) are a direct exercise of the commerce and mail powers over specific activities enumerated in section 4 (a) done through the mails and the channels of interstate

[74] That section 5 (b) vests no such discretion in the Commission and does not constitute an invalid delegation of power, see pp. 194–195, *infra*.

commerce. And the federal power over activities carried on in the federal channels of intercourse is as broad as the police power of the states over activities carried on in their domain (see pp. 158–178, *infra*).

(6) Defendants assert (brief, p. 69) that, in any event, the registration requirement goes too far because once a company registers "it must for all time subject itself to the authority of the Commission" regardless of the nature of its future activities. As we have shown (see pp. 49–52, *supra*), this argument is without merit because it is based on the false premise that registration binds a company to comply with the other provisions of the Act. But even on its face the contention is unsound. Section 5 (b) in itself operates only once. Only once are the defendants obliged to register and file a registration statement under section 5 (b), and their duty so to do is the sole question now in issue. Their future duties under the Act are governed by other provisions which are not now the subject of specific controversy and not now before the Court. While section 14, like section 13 of the Securities Exchange Act of 1934, does require a registration statement to be kept current, such a requirement is certainly not unreasonable considering the fact that the activities and transactions enumerated in section 4 (a) continue to affect the rights of investors and consumers long after they take place.

But defendants, to divert the Court's attention from a realistic consideration of the Act based upon their own course of business, or upon the course of business of practically all holding companies which may be obliged to register under the Act, argue that once having registered, holding companies will be required, regardless of any contemplated use of the instrumentalities of interstate commerce or the mails, to file with the Commission such data and information as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers (sections 5 (b) and 14).

This Court will have ample power to deal with such a case if and when it becomes real and ceases to be hypothetical. Certainly no company before this Court is being called upon to register regardless of any probable future use of the federal channels of commerce. Each of the defendants alleges that it is constantly doing one or more acts enumerated in section 4 (a), and many, if not all, of these acts—such as the public offering of securities, the making of service arrangements, or the acquiring of utility properties—may affect the rights and interests of investors and consumers far into the future. Not only have defendants failed to show any encroachment on their own constitutional rights, but the hypothetical case which disturbs them is fanciful and far removed from any typical situation found among the public-utility holding

companies affected by this legislation. "'A possible application to extreme cases' is not the test of reasonableness of public rules and regulations." *Lemieux* v. *Young*, 211 U. S. 489, 493. Such extreme cases are not likely to be found in practice. If such cases did appear, it is virtually certain that they would fall within some one of the numerous exemptions prescribed by the Act.

Furthermore, it cannot be assumed that the Commission—having power under section 5 to prescribe the extent of the information to be included in the registration statement and having power under section 20 (c) to classify persons subject to the Act and to prescribe different requirements for different classes of persons—would apply section 4 (a) and section 5 (b) so as to impose any unreasonable burden upon a registrant or to elicit information unrelated to the problems and evils of an interstate character at which the Act is directed. With the exemptions and administrative flexibility which the Act provides, there is no reason for the assumption that information is or may be required which bears no relation to the acts enumerated in section 4 (a) and to the effects of such acts upon the investing and consuming public.

(7) Finally, it is not true, as the defendants suggest (brief, p. 37) that a holding company once registered may be relieved from its status as a registered holding company only by ceasing to be a hold-

ing company. It must be relieved if it has become predominantly intrastate in character (section 3 (a) (1)), or if it has become predominantly an operating company (section 3 (a) (2)), or if it has become only incidentally a utility holding company being primarily engaged in other than utility enterprises (section 3 (a) (3)), or if other specified contingencies occur. And these exemptions provided in section 3 (a) are mandatory. The conditions which the Commission may attach to such exemptions must be limited to, and interpreted in light of, the purposes of the Act. Section 1 (c) expressly provides that every provision of the Act shall be interpreted to meet the problems and to eliminate the evils connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce. The Commission has formally ruled that the conditions it is authorized to attach to the mandatory exemptions authorized by section 3 (a) must be based on its finding that the exemption, unless so qualified and conditioned, would be detrimental to the public interest or that of investors and consumers by reason of the activities of the holding company or its subsidiary companies in interstate commerce or directly affecting or burdening interstate commerce (see Appendix A, pp. 7–9). As a matter of fact, the present rule of the Commission grants automatic exemptions

without qualification or condition, to all companies falling within the terms of section 3 (a) (1).[75]

B. THE CONGRESS HAS THE POWER TO PREVENT THE USE OF THE CHANNELS OF INTERSTATE COMMERCE AND THE POSTAL FACILITIES FOR A PURPOSE OR IN A MANNER DEEMED CONTRARY TO SOUND PUBLIC POLICY

Cleared of the confusion created by defendants' efforts to show that the registration provisions are not, in fact, a regulation of the activities enumerated in section 4 (a), the issues of the scope of federal power here presented are not difficult.

We have already shown that the specific exercises of federal power under the various paragraphs of section 4 (a) are predicated, in each instance, upon acts done in interstate commerce or through the mails. With the possible exception of section 4 (a) (6) (see pp. 105–116, *supra*), they do not even involve reliance upon the power of the Congress to regulate matters affecting interstate commerce or the mails. In these circumstances, reply to defendants' objections to the simple requirements of disclosure imposed by the registration provisions might well be rested here.

The defendants' challenge to the validity of those requirements, however, raises issues of so great importance as to justify a further examination of the general principles announced by this

[75] Rule 3A-2, Exemption of Holding Companies (Securities and Exchange Commission, General Rules and Regulations under Public Utility Holding Company Act of 1935 (April 15, 1937), p. 15).

Court which that challenge brings into question. The defendants' contention appears at times to be predicated upon the view that federal power over acts done in interstate commerce or through the mails is confined to a vaguely defined category of acts which are in some fashion *mala in se*. At other times the suggestion is that the promotion of commerce itself, or presumably of the use of the mails, is the limiting criterion of the validity of federal action. The decisions of this Court afford no warrant for such contentions. In this section we shall show that the Congress has a plenary power to regulate acts done in interstate commerce or through the mails, when those acts are done for a purpose or in a manner reasonably deemed by it contrary to sound public policy; and that such regulation may tend to accomplish a similar purpose, and may be attended by the same incidents, as an exercise by a state of its police power.

1. The power of the Congress under the commerce clause.

Acting within the scope of its delegated powers, the Congress has the same plenary authority in its domain that the states enjoy in their domain to employ such regulatory devices as it deems reasonably adapted to the public welfare. The point has been clearly expressed by this Court in *Hamilton* v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146, 156:

> That the United States lacks the police power, and that this was reserved to the

> States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose.

In later cases under the commerce clause, this Court has spoken of a "police power, for the benefit of the public, within the field of interstate commerce," *Brooks* v. *United States,* 267 U. S. 432, 436–437. Cf. *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334, 346–347; *Stafford* v. *Wallace,* 258 U. S. 495, 516; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 41. Whatever the language employed, the conclusion is inescapable that the protective power of Congress over interstate commerce may be exercised to the same extent and for the same purposes as the power of a state over local commerce.

The subject of the federal power under the commerce clause was fully discussed in *Champion* v. *Ames,* 188 U. S. 321, in which this Court upheld a prohibition against causing the transportation of lottery tickets from one state to another. Prior to that decision the Court had assumed without question the validity of the Animal Industry Act (23 Stat. 31) which prohibited the interstate transportation of livestock known to be infected with a contagious disease. *Missouri, K. &*

T. R. Co. v. *Haber*, 169 U. S. 613; *Reid* v. *Colorado*, 187 U. S. 137; cf., *Thornton* v. *United States*, 271 U. S. 414. The Court subsequently sustained the power of Congress to forbid the interstate shipment of food and drugs unless they are unadulterated and properly labeled. *Pittsburgh Melting Co.* v. *Totten*, 248 U. S. 1; *Weeks* v. *United States*, 245 U. S. 618; *McDermott* v. *Wisconsin*, 228 U. S. 115; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45. It has similarly sustained the White Slave Traffic Act (36 Stat. 825), *Hoke* v. *United States*, 227 U. S. 308, even where no commercial vice was involved, *Caminetti* v. *United States*, 242 U. S. 470; and the National Motor Vehicle Theft Act (41 Stat. 324), punishing the interstate transportation of stolen motor vehicles. *Brooks* v. *United States*, 267 U. S. 432. In a series of statutes the Congress has closely regulated the interstate transportation of liquor, and in every case this power has been sustained. *In re Rahrer*, 140 U. S. 545; *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311; *United States* v. *Hill*, 248 U. S. 420; *United States* v. *Simpson*, 252 U. S. 465. And within the past two years similar statutes regulating the transportation of prison-made goods have been upheld by this Court. *Whitfield* v. *Ohio*, 297 U. S. 431; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334.

The power exercised in these statutes has been described by the Court in the following terms: "Congress can certainly regulate interstate com-

merce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce." *Brooks* v. *United States,* 267 U. S. 432, 436–437; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334, 347.

(*a*) *The power of the Congress is not limited to forbidding the transportation of articles intrinsically harmful.*

The defendants renew the suggestion that the power "of preventing misuse of the channels of interstate commerce and of the mails" (brief, p. 73) can be exercised only with reference to articles intrinsically harmful, and then only by absolute prohibition and not by regulation (*ibid.*). This argument has long since been discredited.

"The power to regulate interstate commerce resides in the Congress, which must determine its own policy." *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334, 347. "The Congress in exercising the power confided to it by the Constitution is as free as the states to recognize the fundamental interests of free labor" (*Id.* at 352). It is equally free to recognize the fundamental interests of investors (Cf. *New York Central Securities Corp.* v. *United States,* 287 U. S. 12)

and consumers (*Hipolite Egg Co.* v. *United States*, 220 U. S. 45).

In upholding the constitutionality of the registration provisions of the Securities Act of 1933, the Circuit Court of Appeals for the Seventh Circuit, in *Securities and Exchange Commission* v. *Crude Oil Corp.* (decided November 23, 1937) adopted the following statement from Judge Manton's opinion in the court below:

> Nor is the police power within the field of interstate commerce limited to prohibiting the transportation of articles that are themselves harmful. The stolen motor car involved in the Brooks case (267 U. S. 432) was not in itself different from an automobile lawfully acquired. There was nothing harmful or immoral about prison made goods, governed by the Hawes-Cooper Act, involved in *Whitfield* v. *Ohio* (*supra*), or in the oil regulated by the Connally Act (*Griswald* v. *President, etc.*, 82 Fed. 2, 922 (C. C. A. 5)). *In each of these statutes, as in the registration provisions of this Act, it was held, Congress conditioned particular uses of the channels of interstate commerce upon certain safeguards to prevent those uses from being made the instruments of causing evil or harm in a state other than the state of origin, even though the articles or communications transported might not be inherently harmful.*

In sustaining provisions of the Securities Exchange Act of 1934, which requires not merely pub-

licity, as does the Securities Act, but which forbids certain transactions in securities by use of the mails or the channels of interstate commerce, Judge Patterson stated (*Securities and Exchange Commission* v. *Torr*, 15 F. Supp. 315, 319 (S. D. N. Y. 1936), reversed on other grounds, 87 F. (2d) 446 (C. C. A. 2d, 1937)):

> It cannot be doubted that Congress may close the channels of interstate commerce likewise to such transactions in corporate securities as it has reasonably found and declared to be directly detrimental to the financial health of the public generally.

The communications regulated by the Grain Futures Act of 1922, the Securities Act of 1933, and the Securities Exchange Act of 1934 are of the same character as many of those that would be affected by the present Act.[76] They are communications of

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[76] The regulatory mechanism of the registration provisions of the Holding Company Act—conditioning the use of the mails or the channels of interstate commerce upon compliance with the registration provisions of the Act—is essentially similar to the mechanism employed in the Pure Food and Drug Act and in the Animal Industry Act, and approved by this Court. So, too, the Grain Futures Act makes it unlawful to use the mails or channels of interstate commerce without complying with regulations prescribed by the Congress in respect of transactions in grain futures. See *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 42. The Securities Act of 1933 and the Securities Exchange Act of 1934 similarly make it unlawful to use the mails or channels of interstate commerce without complying with regulations prescribed by the Congress in respect of certain transactions in securities.

a business and financial nature which the Congress has found potential instruments of injury to investors and the general public in the state of destination when made without the full and fair disclosure prescribed by the Congress. The constitutionality of the Securities Act of 1933 has been sustained by every court which has had occasion to consider it.[11] The commerce clause makes no distinction between commerce in tangible commodities and commerce in intangible electricity (*Public Utilities Commission* v. *Attleboro Steam & E. Co.*, 273 U. S. 83), intangible ether (*Fisher's Blend Station, Inc.* v. *Tax Commission*, 297 U. S. 650), or intangible services (*Associated Press* v. *National Labor Relations Board*, 301 U. S. 103).

It has never been a doctrine of this Court that the national police power within the field of interstate commerce is limited to the protection of the

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[11] *Securities and Exchange Commission* v. *Jones*, 12 F. Supp. 210 (S. D. N. Y. 1935), aff'd (on basis of postal power), 79 F. (2d) 617 (C. C. A. 2d, 1935), reversed on other grounds, *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1; *Securities and Exchange Commission* v. *Jones*, 15 F. Supp. 321 (S. D. N. Y. 1936), aff'd, 85 F. (2d) 17 (C. C. A. 2d, 1936), *cert. den.*, 299 U. S. 581. The same statute has been sustained in various aspects by other federal courts in the cases of *Coplin* v. *United States*, 88 F. (2d) 652 (C. C. A. 9th, 1937), *cert. den.*, 301 U. S. 703; *Securities and Exchange Commission* v. *Wickham*, 12 F. Supp. 245 (D. Minn. 1935); *United States* v. *Bogy*, 16 F. Supp. 407 (W. D. Tenn. 1936); *Newfield* v. *Ryan*, C. C. A. 5th, decided July 22, 1937; *Securities and Exchange Commission* v. *Crude Oil Corp.*, C. C. A. 7th, decided November 23, 1937.

physical health and morality of the nation. But if any such doctrine was ever announced, *Whitfield* v. *Ohio*, 297 U. S. 431, and *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, leave no doubt that Congress is not now subject to that disability. The great variety of cases in which prohibition or regulation of interstate transactions has been upheld clearly show that the Congress may impose such prohibition or regulation to combat evils of widely varying nature. In the *Kentucky Whip* case, this Court stated (299 U. S. at 347):

> The anticipated evil or harm may proceed from something inherent in the subject of transportation as in the case of diseased or noxious articles, which are unfit for commerce. *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *Oregon-Washington R. & N. Co.* v. *Washington*, 270 U. S. 87, 99. Or the evil may lie in the purpose of the transportation, as in the case of lottery tickets, or the transportation of women for immoral purposes. *Champion* v. *Ames*, 188 U. S. 321, 358; *Hoke* v. *United States, supra; Caminetti* v. *United States*, 242 U. S. 470, 486. The prohibition may be designed to give effect to the policies of the Congress in relation to the instrumentalities of interstate commerce, as in the case of commodities owned by interstate carriers. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 415. And, while the power to regulate interstate commerce resides in the Congress,

which must determine its own policy, the Congress may shape that policy in the light of the fact that the transportation in interstate commerce, if permitted, would aid in the frustration of valid state laws for the protection of persons and property. *Brooks* v. *United States, supra; Gooch* v. *United States,* 297 U. S. 124.

Furthermore, it is clear that in regulating activities carried on through the federal channels of commerce, the Congress has power to demand information regarding intrastate activities not carried on through the federal channels of commerce if such information is necessary or appropriate to a proper appraisal of the significance and effects, or the protection of the credit and goodwill, of activities carried on through federal channels of commerce. *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194; *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456; *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288. Indeed, when the effects of such local activities are sufficiently direct, the Congress may go further and control those effects in the public interest by direct regulation. *Shreveport Rate Cases* (*Houston, E. & W. T. R. Co.* v. *United States*), 234 U. S. 342; *Delaware, L. & W. R. Co.* v. *United States,* 231 U. S. 363, 370; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1.

The precedents further show that the federal power may be exercised to control innocent as well as harmful transactions to ensure that the innocent

shall not be perverted to the pernicious—and this even with respect to activities not in interstate commerce but which directly affect such commerce. *Stafford* v. *Wallace,* 258 U. S. 495; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1.

(b) The question of the power of the Congress to meet evils which are not spread or perpetuated by the use of the channels of interstate commerce is not here involved.

It may be conceded, for the purposes of this proceeding, that the Congress cannot exercise the commerce power to meet evils which are not spread or perpetuated by the use of channels of interstate commerce. That is the doctrine of *Hammer* v. *Dagenhart,* 247 U. S. 251. But there is nothing in that case, as both the prior and subsequent decisions of this Court demonstrate, which denies the power of the Congress to prohibit or regulate the use of the channels of interstate commerce for a purpose or in a manner found by the Congress to be contrary to sound public policy.

In *Hammer* v. *Dagenhart,* the majority of the Court found that the Child Labor Act arbitrarily prohibited the shipment of goods in interstate commerce, not for the purpose of regulating commerce, but for the purpose of regulating local conditions of manufacture. The statute so viewed was deemed an attempt to invade the powers of the states. Earlier cases were distinguished on the ground that in each of them "the use of interstate transporta-

tion was deemed necessary to the accomplishment of harmful results," and that the prohibition was essential to correct these results (247 U. S. at 271). That the authority of those earlier cases is not impaired by the decision is shown by the recent statement of this Court in *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, 350:

> The ruling in *Hammer* v. *Dagenhart*, 247 U. S. 251, upon which petitioner relies, in no way contravenes or limits the principle of these [earlier] decisions. In the *Hammer* case, the Court concluded that the Act of Congress there under consideration had as its aim the placing of local production under federal control. *Id.*, pp. 271, 272. Far from disapproving the decisions we have cited, the Court expressly recognized their authority. "In each of these instances," the Court said, "the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended." *Id.* And within a few months after the *Hammer* case, the court in *United States* v. *Hill, supra,* emphatically reiterated the doctrine of these cases and, in particular, that of *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, sustaining the Webb-Kenyon Act.

As the majority of the Court viewed the record in *Hammer* v. *Dagenhart,* the case bore no resem-

blance to cases like *Champion* v. *Ames,* 188 U. S. 321, *Caminetti* v. *United States,* 242 U. S. 470, *Brooks* v. *United States,* 267 U. S. 432, or *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334. The *Caminetti* case would have been somewhat analogous to *Hammer* v. *Dagenhart,* as that case was viewed by the Court, if the Mann Act, instead of making it a crime to transport a person in interstate commerce for an immoral purpose, had made it a crime for any person who had illicitly cohabited with a person of opposite sex in one state to travel into another state within thirty days after such cohabitation. The controlling question is whether the statute is really aimed to prevent evils which are accomplished or spread by use of the federal channels of commerce, or whether it merely denies to an evildoer the use of those channels after a wrong has been locally consummated and its evil effects fully accomplished.

There can be little doubt that the conclusion of the majority of the Court in *Hammer* v. *Dagenhart* was affected by the fact that child labor is within the legal power of the state of manufacture to control. By contrast, cases like *New Hampshire Gas & Electric Co.* v. *Morse,* 42 F. (2d) 490 (D. N. H. 1930), *Toledo Traction, Light & Power Co.* v. *Smith,* 205 Fed. 643 (N. D. Ohio 1913), and *State Public Utilities Commission* v. *Romberg,* 275 Ill. 432, 114 N. E. 191 (1916), clearly demonstrate the legal and practical impotence of

state action against the utility *holding company* located outside the state and whose activities and interests are not confined to a single state. The interstate corporate and financial transactions of that type of company, together with the interstate transmission of gas and elecric energy, are the only activities with which the present Act is concerned. The intrastate operations of the utility industry—its service to consumers, its rates, and its labor conditions—are not within the scope of the Act; and primarily intrastate holding companies are by specific provision entitled to exemption from the Act. Whatever may be said of the manufacture regulated by the Child Labor Act, the business of utility holding companies at which this Act is directed cannot be regarded as essentially local; and the Act is carefully designed not to interfere with truly intrastate or local aspects of the public-utility industry. In view of the express findings of the Congress (section 1 of the Act) and of the District Court (R. 2225–2226), it is clear that the evils at which the Act is directed are spread and perpetuated by use of the federal channels of commerce.

Defendants' citation of *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, is clearly inapposite. The Court in that case did not suggest that Jones was under no obligation to register and make full disclosure under the Securities Act if he used the mails or channels of interstate commerce to sell securities. The implications of the decision are to

the direct contrary. If the defendants had registered under the Holding Company Act *before* they had ever carried out through the mails or the channels of interstate commerce any of the acts or transactions mentioned in section 4 (a) and had then notified the Commission that they had decided not to carry out any such act or transaction and wished to withdraw their registration, there might be some parallel between the two cases; but on the record there is none.

2. The power of the Congress over the mails.

Under its power to establish post-offices and post-roads, the Congress has authority to regulate the postal system of the country and within wide limits to determine what may be carried by that system and the conditions which must be met in respect of activities carried on by the use of the mails. The power is not limited to the protection of the facilities of the mails; it may be exercised to prevent the use of the mails for purposes which the Congress deems objectionable to a sound public policy.[78] The Congress has not infrequently forbidden the use of the mails for purposes deemed inimical to

[78] This power over the mails is probably even more comprehensive than that over interstate commerce, for the Government's interest in the mails is proprietary as well as regulatory. Cf. *Atkin* v. *Kansas*, 191 U. S. 207 (statute fixing hours and wages for state and municipal public works); *Ellis* v. *United States*, 206 U. S. 246 (statute fixing hours of labor on federal public works); *Stephenson* v. *Binford*, 287 U. S. 251 (state regulation of use of state highways).

the general welfare; and no such exercise of the mail power has ever been adjudged unconstitutional.

The Government makes no contention that the power to exclude from, and to provide conditions for, the use of the mails is an unlimited power or one that can be exercised arbitrarily. The Government is contending here only that the mail power goes to the extent, and is subject to the limitations, indicated by Mr. Justice Brandeis in his dissenting opinion in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 430. Although Mr. Justice Brandeis in that case differed from the majority of the Court on the matter of statutory interpretation, his statement on the scope of the mail power is not inconsistent with the majority opinion, and is perhaps a narrower view of the scope of the postal power than that taken by the majority of the Court:

> The power to police the mails is an incident of the postal power. Congress may, of course, exclude from the mails matter which is dangerous or which carries on its face immoral expressions, threats, or libels. It *may go further and through its power of exclusion exercise, within limits, general police power over the material which it carries, even though its regulations are quite unrelated to the business of transporting mails.* * * * As stated in *Ex Parte Jackson*, 96 U. S. 727, 732: "The difficulty attending the subject arises, not from the want of power

> in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail." In other words, the postal power, like all its other powers, is subject to the limitations of the Bill of Rights.

Furthermore, it may be conceded for the purpose of this proceeding, that the mail power is subject to the same limitations placed upon the commerce power by *Hammer* v. *Dagenhart,* 247 U. S. 251—that is, that the mail power cannot be exercised to prevent evils which are not spread or perpetuated by the use of the mails (see pp. 168–171, supra). The Government rests the defense of the mail power which the Congress has exercised in this Act on the unassailable ground that the Congress may prevent the use of the mails—as it may prevent the use of the channels of interstate commerce—as an "agency to promote * * * the spread of any evil or harm" among the people of the United States.

The federal power over the mails is not limited to the regulation of practices which, irrespective of the use of the mails, would be within the regulatory powers of the federal government. Thus, although the federal government has no power to enact criminal laws except in aid of the express powers of Congress, cases of fraud have been brought within the sphere of federal crimes where the mails have been used in furtherance of the fraudulent pur-

pose. The "fraud orders" of the Post Office Department have gone so far as to prohibit the *receipt* of mail by anyone declared to be engaged in such fraudulent scheme; and this Court has sustained the prohibition. *Public Clearing House* v. *Coyne,* 194 U. S. 497. Although the Congress has no power to suppress lotteries as such, it may prohibit and make criminal the transportation of lottery tickets through the mails. *Ex parte Jackson,* 96 U. S. 727; *In re Rapier,* 143 U. S. 110.[79] Al-

[79] The scope of the power exercised in these statutes was not unappreciated at the time that they were sustained by the Court. In *In re Rapier* the validity of the exclusion from the mails of letters concerning lotteries and of newspapers containing advertisements of lotteries, was severely attacked in argument by the Honorable James C. Carter. He contended that the Congress "was not exercising the power of regulating the mail service, for there was no relation between the means employed and *that* end. The real power which it attempted to exercise," he asserted, "was to hamper and impede, and, if possible, to destroy, the lottery business, in order to protect the people of the United States from the assumed demoralizing and dangerous tendency of lotteries" (143 U. S. at 117). Mr. Carter conceded the power of the Government "to exclude from the mails all matter promoting such acts as it has the authority to declare to be criminal offences and to punish as such; and also all matter promoting what were, at the time of the adoption of the Constitution (and possibly what in the progress and development of our society may come to be) universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, larceny, etc." (143 U. S. at 119). In this class of *mala in se*, lotteries did not fall, because, "universally allowed at the time of the adoption of the Constitution, and still allowed in some of the States, they can only be regarded as among that class of things which may be

though the Congress has no power over the business of publishing as such, it may require those enjoying the privilege of second class mail—a privilege practically indispensable to any newspaper or periodical—to make regular statements of the ownership of the periodical, the names of its editors, and the extent of its circulation. *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288.[80]

Lotteries, obscenity, theft, and fraud do not constitute a closed category to which the exercise of the police power over the mails is limited.

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made *mala prohibita*" (143 U. S. at 120). The Court unanimously rejected these contentions, and Mr. Chief Justice Fuller wrote (143 U. S. at 134): "We think there is no room for such a distinction here, and that *it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses.*"

[80] The mail power has been similarly exercised in the Grain Futures Act of 1922, the Securities Act of 1933, and the Securities Exchange Act of 1934.

Judge Soper in *Burco, Inc.* v. *Whitworth*, 81 F. (2d) 721 (C. C. A. 4th, 1936), *cert. den.*, 297 U. S. 724, did not take a contrary view, for he stated (81 F. (2d) at 739): "The [mail] power has been frequently exercised to regulate practices in the use of the mails which Congress decided would be injurious to the carriage of the mails or would subject the mails to use for fraudulent or unlawful purposes." Judge Soper's position was simply that "no question of fraud or improper use of the mails is involved, since any plan of reorganization must meet with the approval of the District Court and be carried out under its supervision" (81 F. (2d) at 740). Even if this view were correct in its implication that the Congress cannot condemn as improper any activity which does not seem improper to a court, it is clearly inapplicable to activities not carried out under court supervision.

This power may be exercised by the Congress in accordance with its own view of sound public policy. As Mr. Justice Holmes said in affirming a mail fraud conviction in *Badders* v. *United States*, 240 U. S. 391, 393:

> The overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. * * * *Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not.*

The public policy at the base of the regulations sustained in *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, was far removed from the mere prevention of fraud. The Congress exercised its powers of classifying the mail so as "to favor the widespread circulation of newspapers, periodicals, etc.," in order to promote the dissemination of current intelligence. And to enable the public to judge what, if any, bias influenced the intelligence thus disseminated, the Congress required disclosures fundamentally similar to the disclosures required by the registration provisions of the Holding Company Act.[81]

[81] The registration provisions of the Act relate to the specific activities carried on through the mails by utility holding companies—i. e., to their security transactions, their acquisition of utility properties, and to their intra-system service, sales, and construction contracts. This regulation certainly is no different in kind from the regulation of the press (whose freedom is expressly guaranteed by the Constitution) sanctioned in *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288.

It cannot be said that these regulations were sustained only because they were attached to second class mail privileges, for Mr. Chief Justice White was careful to point out that the Court was not adopting the view that there was an absolute right to withhold or condition the grant of such privilege.

The exercise of the mail power in the Holding Company Act does not differ essentially from its exercise in the Securities Act of 1933, sustained in *Securities and Exchange Commission* v. *Jones,* 79 F. (2d) 617 (C. C. A. 2d, 1935), reversed on other grounds, *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1; and in *Securities and Exchange Commission* v. *Jones,* 85 F. (2d) 17 (C. C. A. 2d, 1936), *cert. den.,* 299 U. S. 581. The Securities Act, in order to prevent abusive practices that may lead to the defrauding of investors, and in order to encourage intelligent investment of the nation's financial resources, requires registration and disclosure of facts which the Congress deems relevant to the integrity and value of securities to be sold through the mails. The Holding Company Act, in order to prevent abusive practices of a similar character by utility holding companies and in order to prevent the mails from being used to carry out transactions which deceive or thwart state regulatory bodies, similarly requires registration and disclosure of facts which the Congress deems relevant and essential to the integrity and harmlessness of financial transactions and service contracts carried out through the mails.

C. THE POWER OF THE CONGRESS TO REGULATE THE USE OF THE CHANNELS OF INTERSTATE COMMERCE OR THE MAILS IS NOT ABRIDGED BY THE FACT THAT THE USE OF SUCH CHANNELS OF INTERCOURSE IS INCIDENTAL OR SPORADIC OR IS NOT THE MAJOR ACTIVITY OF THE USER

There is no constitutional doctrine which limits the federal power over the mails or over interstate commerce to the enactment of statutes which apply only to persons whose principal business is carried on in interstate commerce or by use of the mails. Transactions in interstate commerce or the mails are not removed from the scope of the commerce power merely by dubbing them—whether justly or unjustly—incidental. Holding companies are not immune from specific federal statutory rules regarding their use of the mails and the channels of interstate commerce simply because some, or even the major part, of their activities or the activities of their local subsidiary operating companies may be intrastate.[22]

It has been held that one carrying a single bottle of liquor from Kentucky into West Virginia upon his person and for his own use exposes himself to the penalty of federal law, although even the law of West Virginia did not attempt to deny him that occasional indulgence. *United States* v. *Hill*, 248 U. S. 420; *United States* v. *Simpson*, 252 U. S. 465. It could hardly have been argued as a defense

[22] In Appendix B, the Government discusses the pertinent facts relating to the defendant companies as set forth in the record, and shows that the true business or businesses of those companies are in interstate commerce and in the use of the mails. (See particularly pp. 101–122.)

to the prosecution that defendant did a thriving retail liquor trade in Kentucky and as an incident thereto supplied his own personal wants in his home in West Virginia. Nor has it ever been suggested that an offender under the lottery laws (*Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110; *Champion* v. *Ames*, 188 U. S. 321) could exculpate himself by showing either that he used the mails and the channels of interstate commerce for manifold other purposes or that he peddled a thousand lottery tickets from house to house in a single state for every one he sold through the mails or the channels of interstate commerce. One illicit adventure across a state boundary is sufficient to expose the offender to penalties of the Mann Act. *Caminetti* v. *United States*, 242 U. S. 470. The owner of a local bawdy house runs afoul of the federal law when she reaches out but once beyond the state to procure a single recruit for her local common calling. *Hoke* v. *United States*, 227 U. S. 308. And the Pure Food and Drug Act, *Weeks* v. *United States*, 245 U. S. 618, and the Animal Industry Act, *Thornton* v. *United States*, 271 U. S. 414, have been applied without hesitation to incidental occurrences such as the misrepresentations of salesmen or the sporadic ranging of cattle across state lines.

This Court has recognized that although an electric generating plant sells 97 per cent of its output within the state of generation, the sale of the other 3 per cent outside the state is subject to "the exer-

cise of the power vested in Congress." *Public Utilities Commission* v. *Attleboro Steam & E. Co.*, 273 U. S. 83, 90. Local newspapers and periodicals are not immune from postal regulations, *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, simply because a hundred copies are distributed locally by hand to every copy sent through the mails. The controlling decisions leave no doubt that the mere fact that a transaction consummated through the mails or the channels of interstate commerce may properly be classed as incidental to something else does not devitalize federal power when that power is deliberately exercised to reach the interstate transaction.[82]

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[82] There are, of course, numerous cases where the incidental nature or character of the acts done in interstate commerce was found by the Court to be relevant to the validity of the exercise of the state or federal power involved. Such is the situation in many cases involving the right of the state, in the absence of Congressional action, to tax or regulate. Such is also the situation in many cases involving the interpretation of particular federal enactments, like the Sherman Act, the Hepburn Act, or the Employers' Liability Act, where the question is not one of constitutional power but of the purpose and scope of a particular statute. Such cases have no application to a statute such as the Holding Company Act in which the Congress has defined with clarity and precision the specific acts in interstate commerce or in the mails which are to be subjected to regulation in the national public interest.

II. THE REGISTRATION PROVISIONS DO NOT VIOLATE ANY RIGHTS GUARANTEED TO THE DEFENDANTS UNDER THE FIFTH AMENDMENT

Although the defendants are never explicit in their brief regarding any alleged due process objection to the registration provisions, the conclusion of the District Court, affirmed by the Circuit Court of Appeals, that sections 4 (a) and 5 do not violate the Fifth Amendment (R. 2253–2254) was assigned as error (R. 2272) and is presented for consideration in defendants' specification of errors (brief, pp. 42–43).

(1) Defendants suggest that the Holding Company Act involves an arbitrary selection or classification in that it does not attempt to regulate all corporations but only holding companies which actually control electric and gas utility subsidiaries (R. 2273). The answer is clear. Holding companies are artificial corporate persons controlling other artificial corporate persons; of necessity their managements have dual and often inconsistent obligations toward their own and their subsidiaries' security holders. Long experience supplemented by the careful investigations of the Federal Trade Commission, Congressional committees, and others, has disclosed the need for special regulatory legislation dealing with public utility holding companies which are affected with a national public interest (section 1 (a)), and "which are engaged in interstate commerce or in activities which directly affect or burden interstate

commerce" (section 1 (c)).[84] A need for special regulation has similarly been recognized in legislation dealing with holding companies in the banking field and in the railroad field (see pp. 110–111, *supra*). But holding companies controlling electric and gas utilities which are monopolies not subject to the normal restraints of competition are even more readily and reasonably distinguished from other holding companies (see Appendix A, pp. 1–4).

Although from time to time during the passage of the Holding Company Act the suggestion was made to the Congress by utility representatives that corporate abuses were not confined to the utility field, virtually every utility holding-company representative who appeared before the Congressional committees professed to favor some sort of regulation directed specifically at utility holding companies (Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on H. R. 5423, Part 2, pp. 1223–1224). A number of concrete proposals were presented by the industry to the Congress, but there was scarcely one which was not drawn to apply solely to utility holding companies. No other or different classification

[84] Taxation so heavy as to discourage or break up the multiplication of units under common corporate control has been sustained by this Court. *Fox* v. *Standard Oil Company of New Jersey*, 294 U. S. 87.

was proposed (see, for example, *Id.*, Part 2, pp. 1335ff., 1435ff.).[85]

Of course it is true that holding-company abuses are not confined to the utility field. But it is equally apparent that the Congress "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses." *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160; *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224, 227; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 556–557.

Recently before the Court, the National Labor Relations Act was attacked as being one-sided in its application and leaving untouched abuses for which the employees may be responsible. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1. To this argument, the Court replied (301 U. S. at 46):

> * * * we are dealing with the power of Congress, not with a particular policy or

[85] In submitting his proposals to the Congress, Mr. H. Hobart Porter, an active member of the Committee of Public Utility Executives, stated: "I have for many years been an outspoken advocate of the regulation of public-utility holding companies, having recognized the grave abuses in both organization and management by some units in the industry. While the Securities Act and the Securities Exchange Act have gone a long way toward preventing a recurrence of these abuses, I still believe that a bill should be enacted providing specifically for the regulation and control of public-utility holding companies * * *." (Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on H. R. 5423, Part 2, p. 1435).

> with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative power.

Unless the selection of public-utility holding companies for special regulation is so arbitrary that no state of facts could reasonably be conceived to sustain it, the distinction must be upheld. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78.[86]

(2) Defendants appear also to object on due process grounds to the statutory definition of the term "holding company" (R. 2272–2273). Section 2 (a) (7) defines a "holding company" not as a mere stockholder in gas or electric utility companies, but as a company which actively controls such public utility companies. Ten per cent stock ownership raises a *prima facie* presumption of control, but the Act provides (sections 2 (a) (7) and 2 (a) (8)) that the Commission, upon application by either the putative holding company or subsidiary com-

[86] "Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary." *Borden's Farm Products Co., Inc.* v. *Ten Eyck*, 297 U. S. 251, 263. "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357.

pany, and upon a showing that *in fact* control does not exist, shall declare the company not to be a holding company. This procedure is not discretionary but mandatory upon the Commission, and the action of the Commission is subject to judicial review.

The presumption so established by the Act is neither arbitrary nor unreasonable; it has a proper foundation in corporate practice and experience. "Practical control of a corporation can be exercised, often is exercised and retained, through the ownership by those who are already in managerial control of a substantial minority of the voting power." Report of the Federal Trade Commission to the United States Senate, 70th Congress, 1st Session, Senate Doc. No. 92, Part 72–A, p. 143.[87]

[87] Continuous and effective control is generally safeguarded against surprise by providing the corporation with a reserve of authorized, but unissued, voting stock which can be issued to whomever the directors designate. The use of this device by the Bond and Share system has been described by the Federal Trade Commission: "The principal holding companies of the Electric Bond & Share Co. group—namely, the American Power & Light Co., the National Power & Light Co., and the Electric Power & Light Corporation—through charter provisions denying to stockholders the usual preemptive right to purchase new stock issued, enabled the directors to dispose of the stock to whomever they chose. This, together with the existence of authorized but unissued common stock in large quantities, put the directors in a position to prevent any hostile group from making a successful effort to seize control of these companies." (Report of the Federal Trade Commission to the United States Senate, 70th Congress, 1st Session, Senate Doc. No. 92, Part 72–A, p. 144). See also Appendix B, p. 62.

Particularly is the ownership of a substantial minority of voting stock sufficient to assure control where, as this Court has pointed out and as is the case in the utility holding-company field, the remaining voting stock is widely diffused among numerous and scattered shareholders. *United States* v. *Union Pacific R. Co.*, 226 U. S. 61, 96; cf. *Natural Gas Pipeline Co.* v. *Slattery,* No. 230, October Term 1937, decided December 6, 1937.[88] Furthermore, control based on minority holdings is reinforced and greatly magnified where, as in the Bond and Share system, an extensive servicing arrangement is in force (Appendix B, pp. 71–75).

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[88] In this connection, the testimony of Mr. Samuel Untermeyer during the hearings on the Clayton Act before the House Judiciary Committee, 1914, vol. 1, p. 820, is pertinent. He stated: "In a great railroad, if a man's directors are already in possession, 10 percent is practical control. There is not, in my opinion, any single interest that controls a railroad in America, with the exception of Mr. Hill and one or two others, that has 5 percent of the stock, but they are almost as firmly entrenched as if they had it all. Experience has demonstrated that you cannot dislodge them, even where gross mismanagement is proven."

At the hearings on the Holding Company Act, counsel appearing on behalf of the Committee of Public Utility Executives went even further: "I was quite impressed with the chart that was put up here the other day of the United Corporation. You recall that on that chart there was a showing, for instance, of the American Water Works apparently being in the position of being controlled. As a matter of fact, it is only about 3 percent of their stock that is held by the United. *Can it be true that 3 percent is controlling? It may be, with the aid of others.*" (Hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, on S. 1725, p. 469.)

The Congress, therefore, provided that stock ownership should create a presumption of control, a presumption which might be rebutted by those within whose knowledge the facts regarding control or the absence of control lie. Only by some such administrative procedure could ready evasion have been minimized. Even conclusive presumptions of fact have been upheld by this Court where proof would otherwise have been difficult or evasion probable. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264; cf. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Everard's Breweries* v. *Day*, 265 U. S. 545. Furthermore, the presumption and administrative technique for rebutting it adopted by the Congress is necessary to satisfy the very practical as well as legal necessity for definiteness. Cf. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337. Other methods were objected to by utility interests as too vague. The bill as originally introduced, for example, defined a holding company simply as a company "which controls a public-utility company." (See H. R. 5423 and S. 1725, 74th Congress, 1st Session.) It was asserted that such method of definition would be uncertain and unworkable; the definition was therefore rewritten by the Congress to include the administrative presumption so that companies would be more fairly apprised of their status and be afforded a ready means of definitely establishing their position should the presumption in a particular case not reflect the actual facts. (Report of the Committee on Interstate Commerce, United

States Senate, 74th Congress, 1st Session, Senate Report No. 621, p. 5.)

(3) Defendants seem further to suggest that the exemptions for holding companies provided in section 3 (a) are so arbitrary as to constitute a denial of due process. But each such exemption has a very real and practical basis and evidences the desire of the Congress not to exert its power over the mails and the channels of interstate commerce beyond what seemed to it essential in the national public interest.[89] Cf. *Packer Corporation* v. *Utah*, 285 U. S. 105.

The two principal exemptions in section 3 are for holding companies which are predominantly intrastate systems and holding companies which are predominantly operating companies. In the first (section 3 (a) (1)), the Congress has exempted holding

[89] The proposed amendments of the Committee of Public Utility Executives (R. 655 ff.) constantly suggested a classification of companies, for exemption from various regulations, based not upon an absence of power in the state to regulate but upon the absence of the exercise of that power (see, for example, R. 674 f. 2022, R. 684 f. 2052, R. 685 f. 2053). Federal power, of course, is not dependent upon the exercise or non-exercise of state power; where federal and state jurisdiction over commerce is concurrent, the federal and not the state law prevails. Yet it cannot be urged that the reasonable basis of classification adopted by the Congress for the exemptions in section 3 (a), designed to confine its legislation to matters of genuine national interest, is any less constitutional than that suggested by the Committee of Public Utility Executives, which Committee was advised by counsel of eminence, who no doubt were fully conscious of their public responsibilities.

companies which, although they carry on essential corporate businesses and activities in interstate commerce and through the mails, and hence come within the scope of federal power and the provisions of section 4 (a), regarding such businesses and activities, are none the less primarily systems within a particular state and subject to the effective control of such state. In such circumstances, the Congress found that, although such companies are not entirely beyond the reach of federal power, they present holding-company problems largely within the confines of a single state and are therefore the concern of and can be effectively controlled by that state. The Congress apparently did not consider federal legislation in addition to the Securities Act of 1933 and the Securities Exchange Act of 1934 necessary at this time for these companies, even though it might have the power to control certain of their activities carried on through the federal channels of intercourse.

In the second exemption (section 3 (a) (2)), the Congress provided that a holding company that is predominantly an operating company whose activities are confined to contiguous states should be exempted from the Act. Such a company if engaged in the interstate transmission of electric energy is subject to Congressional regulation and is in fact regulated in its interstate operating business under the Federal Power Act. Yet, if the company is predominantly a local or regional operating

company, with no super-holding company imposed upon it, it is not likely, by and large, to involve the complicated financial and corporate problems characteristic of the types of holding companies dealt with in the Holding Company Act. Such operating companies commonly are not even considered holding companies. The Congress generally conceived of the state commission taking care of the local operating problems, the Federal Power Commission taking care of the interstate operating problems, and the Securities and Exchange Commission intervening when there come into the picture financial and corporate problems, involving and affecting intercourse among the States, which are not deemed to be fully or adequately reached by the Securities Act and Securities Exchange Act."[90]

[90] In a statement submitted to the Congressional committees, Mr. John E. Zimmerman, president of the United Gas Improvement Co., stated: "The problem is considerably simplified if we break down the business of holding companies into its two component parts, namely, those functions which have to do with the supplying of service to consumers and which may incidentally affect the service and rates of the operating companies; and, second, the phases of its business which concern its relations with investors, that is, the financial aspects of the business, including the character and sale of the holding company's securities, and the problems of accounting and reporting of operations. * * *

"Now the regulation of those phases of the holding company's business which concern the investor, as distinguished from the consumer, is more difficult to effect through State regulation. It is true that in the case of holding companies which are predominantly intrastate, State commissions can properly regulate the holding company itself, in all its aspects. However, most holding companies operate in more

These exemptions have been criticized because they exclude a holding company which is not incorporated in the state in which it operates. Although such a company might be subject to the control of the state in which it operates in respect of its local business, the Congress was not satisfied that the state in which it operated could effectively reach certain of its activities outside that state which might have a vital bearing upon its operations within that state. As the control of the state over a foreign incorporated company is not as complete as over a domestic company, and as Congress may properly take account of this important difference, there can be no constitutional objection to the different treatment accorded the two classes of companies in the Act.

The duty to register is imposed only upon companies using the mails or the channels of interstate commerce for specified corporate activities. To what extent the federal power over the mails and

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than one State and have securities held throughout the nation and are, therefore, claimed to be the proper concern of the Federal Government. * * *

"To sum up, a holding company, as it affects the consumer through its control of operating companies, should be, can be, and largely is regulated by State commissions and the trend in this direction should be encouraged rather than impeded. The holding company's relations with its investors will in the future be regulated by the Securities and Exchange Commission, and gaps in this regulation should be corrected by amendatory legislation" (Hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, on S. 1725, pp. 847–849).

the channels of interstate commerce should be exercised is a matter of policy for the Congress to determine. It cannot be said that Congress did not make its determination in this instance with reasonable circumspection.

(4) In final reply to the defendants' due process objections to section 5 (b) (brief, pp. 66–69), it need only be noted that neither defendants themselves nor the Committee of Public Utility Executives (Hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, on S. 1725, p. 419) at any time suggested to the Congress that the disclosures required by the registration provisions of the Public Utility Holding Company Act, substantially identical with those required by the Securities Act and the Securities Exchange Act, were not matters of important public concern. To the contrary, they expressly favored such provisions and regretted the fact that some members of the Congress had minimized their effect and usefulness (see pp. 70–71, 71n., *supra*).

The Government has already considered the value of the registration provisions and the relationship between the information required under section 5 and the activities specified in section 4 (a) (pp. 69–82, *supra*). Publicity has too long been commended as a remedy for social and economic disease for defendants to question its efficacy now. "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

III. THE REGISTRATION PROVISIONS INVOLVE NO UNCONSTITUTIONAL DELEGATION OF POWER

(1) The kind and type of information which may be prescribed by the Commission for inclusion in the registration statement is defined in section 5 (b) with definiteness and precision. A mere reading of section 5 (b) should be sufficient answer to defendants' assertion (brief, pp. 69–70) that it vests uncontrolled discretion in the Commission. The discretion given the Commission under section 5 (b) is almost identical with that given the Commission in respect to the registration of securities under section 12 of the Securities Exchange Act of 1934 and section 7 of the Securities Act of 1933.

Paragraphs (1) and (2) of section 5 (b) (pp. 5–6, *supra*) describe and itemize the required information and documents in great detail; paragraph (3) gives the Commission power to require such additional information or documents "*regarding the registrant or its associate companies or the relations between them*" as the Commission finds necessary or appropriate in the public interest or for the protection of investors or consumers. Not only is this clause sufficiently limited and made definite by the express qualification stating the subject to which the information must relate, and by the ascertainable meaning of the standard "public interest" and "protection of investors or consumers" as used in this Act (see pp. 201–203, *infra*), but it necessarily is governed by the rule of *ejusdem generis*. In these circumstances, it seems captious

to contend, as defendants apparently do (brief, p. 70), that section 5 (b) unlawfully delegates legislative power.

(2) Wholly unwarranted is defendants' suggestion (brief, pp. 30–31) that the power given to the Commission under section 2 (a) (7) to relieve a holding company from the *prima facie* presumption of control which springs from a specified percentage of stock ownership is an unconstitutional delegation of power. The provision directs the Commission, after notice and hearing, to declare a company not to be a holding company if the Commission finds that it does not exercise such control or controlling influence over operating utility companies as to make it necessary or appropriate for the company to be treated as a holding or controlling company in order to protect the public or investors or consumers from the evils at which the Act is directed and which are specified in great detail in section 1.

The bill as originally introduced defined a holding company as a company which directly or indirectly controls a public-utility company (R. 661). As thus drafted the bill would have made it necessary for a company to determine for itself and at its own risk whether it had such a controlling authority over a utility company as to constitute it a holding company. Had this provision not been changed or had it taken the slightly modified form suggested by the Committee of Public Utility Executives (R. 661), holding companies would have

had to guide their own action on the basis of a standard no more definite than that given to the Commission to guide its administrative determinations. Anyone familiar with modern corporate affairs knows the practical difficulties involved in determining the existence or non-existence of corporate control, one of the most elusive problems in corporate finance. There is no single, inflexible rule (whether it be stock ownership, interlocking directorates, or interlocking banking arrangements) that will give the correct solution in all cases. Those practical difficulties were brought out clearly in the testimony before the Congress of counsel for the Committee of Public Utility Executives (Hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, on S. 1725, p. 423) and in the testimony of counsel for the defendants (*Id.* at 326–327). The Congress in reliance upon the Sherman Act precedents (*Nash* v. *United States*, 229 U. S. 373) might have left the bill as it was originally drafted. Had it done so it might have taken many years and successive decisions of this Court to determine just which companies are and which are not holding companies. The result would have been as unsatisfactory to the holding companies as to the public, and there would have been the further danger that the provision might be held invalid for indefiniteness. Cf. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81. But a standard too vague to support a self-operating pro-

vision enforced by criminal liability may well state a policy and purpose sufficiently definite to serve as an appropriate standard for the guidance of administrative action. *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 368.

The standard of "control" was known to be susceptible of judicial and quasi-judicial determination. It had been adopted by the courts themselves in some of the Sherman Act cases. *United States* v. *Union Pacific R. Co.*, 226 U. S. 61. The Congress, however, found it impracticable to put upon the Commission the burden of making the initial specific determination of control for each and every holding company before that company could be deemed a holding company and required to register. Not only would such procedure have been too cumbersome and dilatory to be effective, but it would have placed the burden of proof upon the Commission to ferret out elusive and subtle facts peculiarly within the knowledge of each company, an almost impossible task.

The Congress selected the element of stock ownership, the factor most usually indicative of control, as *prima facie* evidence of control. And in the same provision the Congress set up the machinery for rebutting this presumption so that a company may readily prove, if such be the fact, that it does not possess control. Such burden of proof is not onerous, because every company has completely within its own organization full knowl-

edge and control of all the facts and evidence. And the Act provides that upon the mere filing in good faith of an application for exemption the company shall automatically be exempted until the Commission acts upon the application. Judicial review is provided to guard against any arbitrary action on the part of the Commission and to afford a remedy should the Commission's findings of fact be not supported by substantial evidence (section 24 (a)). No more careful and painstaking effort to meet every legal and practical requirement involved in this difficult and complicated situation could have been made by a legislative body.

(3) In every provision of the Act, the subject-matter of the discretion is clearly defined and delineated and the range of the discretion appropriately related to that subject matter and confined to the declared purposes of the Act.[91]

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[91] Congressional delegations of power to official administrative agencies have been held invalid by this Court in only two cases: *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, and *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. It is upon these two cases that the appellants chiefly rely in their attack upon this feature of the Act.

The kinds of delegation involved in the Holding Company Act are quite distinct from the kinds of delegation held invalid in the two cases just mentioned. In the *Panama* case, the subject of the statutory prohibition—the transportation in interstate commerce of petroleum produced in violation of state law—was defined, but the delegation was held to be improper because the range of administrative discretion was not only unlimited, but wholly undefined. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 415; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 530. In the *Schechter* case, on

Beyond defendants' inconsequential and unfounded contentions as to the delegation of power in the definition of holding company in section 2 (a) (7), their argument on delegation, like their other arguments, consists merely of the vaguest generalities leveled against the Act as a whole. Such arguments are wholly atmospheric and throw no light upon the concrete issues before this Court. The Government does not, therefore, intend to consume the Court's time with omnibus counter-argument, but desires merely to point out that the kind of delegation found in this Act is the kind of delegation that the Court has repeatedly approved. As each case of delegation comes before the courts, the very great care with which the Congress sought to balance the legal requirements of definiteness

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the other hand, the Court was not disturbed so much by the range of discretion granted with respect to any particular subject-matter, as it was by the fact that it could find no "adequate definition of the subject to which the codes are to be addressed." As the Court stated (295 U. S. at 537–538): "But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

The Act here under attack, unlike the statute in the *Schechter* case, defines with painstaking care each particular subject-matter to which the Commission may address itself, and, unlike the statute in the *Panama* case, does not omit to state the range of the administrative discretion vested in the Commission, but clearly states in section 1, as well as in connection with particular provisions of the Act, the purposes for which it may be exercised.

and the practical requirements of flexibility will be even more apparent.

It is clear that the purpose of the Holding Company Act is the extirpation of abuses, of unfair, fraudulent, and tricky conduct, of practices oppressive and unfair (Cf. the concurring opinion of Mr. Justice Cardozo in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 553). Such abuses, conduct, and practices are set forth by the Congress in definite detail in section 1. Furthermore, the means which the Congress has adopted to curb and cure those abuses are delimited with definiteness and precision in each particular regulation in the Act. The Act is projected upon a background of years of state utility legislation. Its provisions find their counterparts and analogies in a long line of federal and state legislative and judicial precedents. In this legislation, as in the Interstate Commerce Act, the Congress has promulgated a series of laws regulating the financial activities of utility holding companies within the scope of federal power to assure their being conducted in accordance with definite standards prescribed by the Congress. And to facilitate the application of these standards, the Congress has directed their administration by an independent, expert, administrative commission. As a matter of fact, the standards in the Act are much more specific and definite than those found in the Interstate Commerce Act or the Radio Act of 1927, which the Court has upheld. *New York*

Central Securities Corp. v. *United States*, 287 U. S. 12; *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266. The standard of public interest, where it is used in the Holding Company Act, has much more definitely ascertainable criteria in the defined scope and expressed purposes of this Act than is the case in either the Interstate Commerce Act or the Radio Act.[92]

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[92] In *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, sustaining the validity of the consolidation provisions of the Transportation Act of 1920, which bear close analogy to a number of the provisions in this Act, Mr. Chief Justice Hughes stated (287 U. S. at 24–25): "Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the 'public interest.' It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service. * * * The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and to the issue of certificates of public convenience and necessity. *Intermountain Rate Cases*, 234 U. S. 476, 486; *Railroad Commis-*

No one familiar with the business of utility holding companies can say that the Congress has not endeavored to work out standards as detailed and specific as possible considering the nature of the subject-matter of the legislation and the multitudinous variants of intricate corporate finance with which the Act deals. Indeed, as the Act proceeded through the committees and the two Houses of Congress, constant objection was made by utility representatives that the hands of the Commission were being tied too tightly and that not enough discretion was being allowed.[92] The President of

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sion v. *Southern Pacific Co.*, 264 U. S. 331, 343, 344; *Avent* v. *United States*, 266 U. S. 127, 130; *Colorado* v. *United States*, 271 U. S. 153, 163; *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42."

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, Mr. Chief Justice Hughes emphatically stated (293 U. S. at 421): "Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility." Cf. *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 529–530.

[92] See, for example, Statement of Wendell L. Willkie, Hearings before the Committee on Interstate Commerce, United States Senate, Seventy-fourth Congress, First Session, on S. 1725, p. 598; Statement of Henry I. Harriman,

defendant Bond and Share objected to the original bill as putting the companies "in a strait jacket," and he went so far as to advise the House Committee "to state general objectives and not a specific method, because conditions change so frequently." In fact, with regard to his recommendation for the elimination of intermediate companies, he could suggest no standard more definite than "the public interest" (see Appendix A, pp. 22–24, 24n.)

One may fairly point out that defendants' complaints against the elasticity of the Act are effectively discounted by their equally vigorous objections to its rigidity. Defendants have denounced as arbitrary, unreasonable, and oppressive nearly every regulation in the Act. Such an inconsistent position can not weaken the conclusion that the Congress has achieved a fair, equitable, and constitutional balance between the practical requirement of flexibility and the legal requirement of definiteness. As the Senate committee which considered the Act reported: "Flexibility of administrative action is necessary in order to assure the workability and efficacy of the statute—to prevent hardships and unexpected burdens, at the same time avoiding the danger of opening possibilities of widespread evasion" (Report of the Committee on Interstate

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Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on H. R. 5423, Part 2, p. 1559.

Commerce, United States Senate, 74th Congress, 1st Session, Senate Report No. 621, p. 6).

Certainly, there is no unconstitutional delegation of power in the clear, specific, and definite provisions of the registration sections of the Act.

PART III. THE CROSS-BILL WAS PROPERLY DISMISSED

The cross-bill was originally directed against both the plaintiff Commission and the individual cross-defendants.[94] The defendants have assigned no error to the dismissal of the cross-bill as against the Commission, and the only question before this Court is the propriety of the dismissal as against the individual cross-defendants.[95]

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[94] The individual cross-defendants appeared and submitted to the jurisdiction of the District Court to assure the defendants the opportunity to raise every question and issue which defendants might have raised by an independent bill in equity against the cross-defendants in the District of Columbia. By so submitting to the jurisdiction of the District Court, the cross-defendants were careful not to waive the right to interpose any objection to the cross-bill which they might have interposed to such an independent bill (R. 262).

[95] In so far as the cross-bill was directed against the Commission, an agency and instrumentality of the United States, it was in effect an attempt to sue the United States without its consent, and must fail. *Illinois Central R. Co.* v. *Public Utilities Commission*, 245 U. S. 493, 504, 505; *Nassau Smelting & Refining Works* v. *United States*, 266 U. S. 101, 106; *Securities and Exchange Commission* v. *Andrews*, 88 F. (2d) 441 (C. C. A. 2d, 1937). While the District Court did not rest its decision on this ground, the validity of the objection was virtually admitted by the defendants before the Circuit Court of Appeals in expressly pointing out to that Court that no error had been assigned to the dismissal of

Consideration of the cross-bill is further simplified by the fact that all issues regarding the registration provisions have been disposed of on the bill and answer. So far as the defendants in their cross-bill ask relief from the registration provisions of the Act, the issues are raised, joined, and fully adjudicated upon the bill and answer without resort to the cross-bill (R. 2248–2249, finding 63). As stated in the opinion of the Circuit Court of Appeals, "the cross-bill is concerned only with provisions of the Act which deal with registered holding companies since the bill and answer provide ample opportunity to decide the issues presented by § 4 (a) and § 5 of the registration sections" (R. 2332).

Furthermore, it must be recognized at the outset that for all practical purposes the cross-bill presupposes not only that the registration provisions are valid, but that they are capable of separate operation and enforcement. The cross-bill could not possibly have any relevancy except on the assumption that the registration provisions are valid and separable and that defendants are under a legal duty to register. For unless defendants are obliged to register, they could never have even hypothetical concern with the rest of the Act, since it relates solely to *registered* companies. And defendants so admit (brief, p. 112).

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the cross-bill against the Commission and that the question was no longer involved in this cause (reply brief before Circuit Court of Appeals, p. 11).

The question presented by the cross-bill, therefore, is whether the defendants, being bound but having failed to register, are entitled upon the present record to level a blanket attack against those regulatory provisions of the Act applicable solely to registered companies. Defendants hardly attempt to answer the grave jurisdictional objections to such a proceeding. The concurrent decisions of the courts below that the cross-bill is fatally defective for failure to present any justiciable controversy, defendants boldly characterize as "pure formalism" (brief, p. 117). Analysis of these jurisdictional objections, however, will demonstrate that they are not formal, but fundamental, and that to entertain the cross-bill would violate basic principles of equity jurisdiction and constitutional procedure.

The cross-bill lacks any concrete subject-matter, since the defendants not only have not registered but have failed to show that if and when they do register they propose to embark upon a specific course of conduct which will bring them into conflict with the provisions of the Act relating to registered companies. (See pp. 207–224, *infra.*) The cross-bill lacks any proper party defendant. The quarrel of the defendants is with the United States, not with the individual cross-defendants who have not threatened to enforce against defendants the provisions of the Act which they now attack. (See pp. 225–243, *infra.*) Defendants' suggestions to the contrary (brief, pp. 121–123) are in denial of

their express stipulation (R. 271–274). The cross-bill also lacks equity; defendants have not even attempted to offer evidence of actual or threatened damage, irreparable or otherwise. (See pp. 243–247, *infra.*) And the existence of such evidence was explicitly denied by the Government (R. 243, 249–250). The cross-bill lacks equity and good conscience for the further and decisive reason that its very premise is the unlawful conduct of the defendants in refusing to comply with the requirements of a valid law. (See pp. 248–250, *infra.*)

I. THE CROSS-BILL PRESENTED NO CASE OR CONTROVERSY BUT SOUGHT ONLY AN ADVISORY OPINION ON HYPOTHETICAL FACTS

The subject-matter of defendants' cross-bill presents no justiciable case or controversy. In order for defendants or any other holding company to present to a court a justiciable controversy in respect of any provision of the Act applicable solely to registered companies, it is necessary for them to show not only that they are registered companies and thus within the terms of such provision, but that they contemplate a definite course of conduct which comes into contact with some specific provision of the Act or with some action of the Commission under such provision. These defendants are not registered companies. But even if defendants were registered, they have set forth neither in their cross-bill nor in the stipulation any specific transaction or course of conduct which is proscribed, con-

trolled, or limited by any provision of the Act applicable to registered companies.

It is not an empty technicality which underlies the insistence of the Commission that the defendants shall not be permitted to raise hypothetical issues relating to registered companies until after the defendants have become registered and have actually come into contact with particular provisions of the Act through its administrative process. It is an insistence that the Act shall be *tested* not in *vacuo,* but in the way in which its terms and its purposes provide that it should *work.*

Defendants have refrained from registering in order to avoid just such a testing of the different provisions of the Act in concrete, specific controversies (R. 268). Defendants in the stipulation clearly set forth that they deliberately refrained from registration because their counsel had advised them that registration *"would involve a sacrifice of the status of a non-registered holding company, and would probably leave the company in a position where it would be required to attack specifically every order of the Commission which was deemed to be unlawful and violative of its rights"* (R. 268).

If defendants believe that the registration provisions of the Act are unconstitutional, it is their privilege—and they have exercised it—to refrain from voluntary compliance. By their decision defendants have made it possible for themselves and their subsidiaries to sell securities, to acquire securities and utility assets, to perform service,

sales, and construction contracts, to make "upstream loans," to engage in other intra-system transactions, and to keep their accounts in any manner which they see fit without running afoul of the provisions of sections 6 to 15, and without fear of the taint of illegality which section 26 might otherwise cast upon such transactions.. But, having deliberately chosen to insulate themselves for a substantial period of time from the application of the very provisions of the Act which they now seek to attack in their cross-bill, surely defendants cannot be heard to complain if the result has also been to prevent any justiciable controversy over such provisions from arising.

Because the District Court could find no present controversy over any section of the Act other than the registration provisions, the Court was obliged to and did find as a fact that it could not "presently determine in what manner and to what extent and in what circumstances, if ever, any such provision of the Act or rule, regulation, or order thereunder will become applicable to any such defendant" (R. 2251, finding 67). The Court found that it was impossible to determine on the record whether the activities of the defendants once they have registered will or will not amount to a violation of some one or more of the provisions of the Act pertaining to registered companies. In such circumstances, the trial court properly ruled that it would not be justified "in deciding intricate con-

stitutional questions in what is clearly a hypothetical case" (R. 2251–2252, finding 67); and this ruling was correctly affirmed by the Circuit Court of Appeals (R. 2332).

The Act is a comprehensive regulatory measure dealing with the intricate and complex corporate and financial interrelations of utility holding companies and their subsidiaries. The constitutional aspects of its numerous provisions cannot be considered in omnibus fashion. The nature of the subject regulated made it possible for the Congress to include only a very few direct prohibitions of conduct. And it was necessary for the Congress to qualify each of its different provisions with important limitations and exceptions. In the main, the Act relies upon administrative application of legislative standards. The Congress has specified in detail the standards to be given administrative application; but the implementation of the Act, subject to court review, has been entrusted to the plaintiff Commission. The Act carefully provides that, beyond the informatory stages of section 5, the application of the Act to the complex affairs of the companies subject to it should be presented to the courts only after the preliminary expert examination and shaping of issues by the administrative process.

Whatever political judgment may be passed on the Act as it stands as a paper law, while its provisions are yet untried and new, no judicial judgment may fairly be formed until its machinery has

been set in motion by the administrative body charged with the responsibility of making its parts work efficiently and smoothly. Cf. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 345–346. Certainly a court cannot assume to pass upon the constitutionality of future authority or conduct of the Commission, "as there has been no action or threat of action, so far as appears, by the commission giving ground for the contention that the constitutional rights of the appellants have been or will be invaded. * * * Whatever uncertainty may exist with respect to possible regulations of the commission will be resolved as regulations are promulgated. If any of these transcend constitutional limits, appellants will have their appropriate remedy." *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 368; *Highland Farms Dairy, Inc.,* v. *Agnew,* 300 U. S. 608.

As Mr. Chief Justice Hughes stated in *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 355:

> Petitioner invites us to enter into a purely speculative inquiry for the purpose of condemning statutory provisions which have not been tried out and the effect of which cannot now be definitely perceived. We must decline that invitation and adhere to the fundamental principle which governs our determination of constitutional questions. *Liverpool, New York & Philadelphia Steamship Co.* v. *Commissioners,* 113 U. S. 33, 39; *Cincinnati* v. *Vester,* 281 U. S.

439, 448, 449; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324.

The crux of the matter is that the defendants do not now say, and certainly this Court cannot predict, what specific acts they or their subsidiaries will perform if and when the defendants are required to register. The cross-bill merely poses a variety of hypothetical controversies. Its allegations necessarily relate only to the nature of activities in which the defendants have in the past engaged as *non-registered* companies, and to these in the most general terms. What, if any, *specific* activities the defendants will engage in after they register, is nowhere apparent. What, if any, of the past activities of the defendants or their subsidiaries will be continued, what new activities will supersede them, and to what extent and in what manner, if at all, these activities will come into contact with particular provisions of the Act if the defendants are required to register, cannot now be determined. Indeed, defendants themselves in their answer to the specific allegations of the plaintiff's bill disclaim knowledge as to whether they will do in the future the very acts with respect to which in the cross-bill they ask the Court to determine the validity of all the provisions of the Act."[96]

[96] Thus, in seeking a broad declaration from the District Court on the whole subject of federal power over interstate security issues and utility acquisitions, the cross-bill alleges in general terms that "the activities forbidden by paragraphs (3), (4) and (6) of said Section 4 (a) [relating to security issues and acquisitions] are essential to the normal

The reality of these basic jurisdictional objections to the maintenance of the cross-bill is strikingly demonstrated by the experience of other companies which, having sought *prior to registration* a sweeping declaration as to the constitutionality of the provisions of the Act relating to registered

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and ordinary conduct of the business of each of the defendants and the use, conservation and development of its properties" (R. 159). But in answering the specific allegations of the plaintiff's bill regarding this very subject matter, defendants assert (R. 100): "*Par. VII, subpar. 3, p. 7.—Defendants are without knowledge whether they will in the future* distribute or make public offerings for sale or exchange of their own securities or the securities of their subsidiary companies or affiliates, or any thereof. * * * *Par. VII, subpar. 4, p. 7.—Defendants are without knowledge whether they will in the future* acquire or negotiate for the acquisition of securities of their subsidiary companies or affiliates or of public utility or holding companies."

The defendants' allegations that the issuance of securities and the making of acquisitions are necessary to the normal conduct of their business, read together with their allegations that they do not intend voluntarily to register (R. 270), constitute threats to violate sections 4 (a) (3), 4 (a) (4), and 4 (a) (6) of the Act. Defendants' allegations support the Government's suit to enjoin threatened violations of these sections of the Act (see Appendix B, pp. 125–131). They do not, however, support the cross-bill, since they do not constitute threatened violations of sections 6, 7, 8, 9, 10, or any other section of the Act. Those sections do not apply to the defendants so long as they abide by their announced intention of remaining non-registered companies. Nor can it be ascertained, before the defendants are registered and have in contemplation a particular security issue or acquisition, just which, if any, provisions of sections 6, 7, 8, 9, or 10 they might be threatening to violate, or the manner in which the violation might be threatened.

companies, have found no occasion *subsequent to registration* for any litigation."[97] It is shown even more concretely by the actions of the defendants themselves during the course of the present litigation.

Since the filing of the plaintiff's bill, two of the intervening non-exempt holding-company defendants—Idaho Power Company and The Montana Power Company—have acquired all of the properties of their utility subsidiaries and have ceased to be holding companies, thereby altering radically

[97] After the decision of the District Court in the instant suit, both the North American Company and American Water Works and Electric Company withdrew their suits in the District of Columbia, where they had not yet proceeded to trial (Cf. *Landis* v. *North American Co.*, 299 U. S. 248), and registered with the Commission. In announcing to its stockholders this decision to register, American Water Works and Electric Company wrote: "The company welcomes the opportunity to cooperate with the commission in the administration of the act, and will afford the fullest cooperation consistent with its duty to protect its security holders. Only in the event of threatened injury will it appeal to the courts. The necessity may never arise. If it does arise and the validity of any provision injuriously applied to the company must be determined by the courts, the company believes it will be able to obtain a prompt adjudication of the question" (Wall Street Journal, February 10, 1937). In similar vein, the North American Company addressed its stockholders: "We believe that after this company has registered, if a practical difficulty should arise, we will be able to obtain a prompt and final adjudication of the relevant provisions of the act as applied to this company" (Wall Street Journal, February 10, 1937). No litigation has yet resulted from registration by these companies under the Act.

their conjectural future obligations under the Act (R. 266, 343). Somewhat earlier, but after the Act had become law, the defendants purported to make extensive adjustments to eliminate interlocking directorates and to reorganize their service arrangements (R. 327–331, 352–358; see Appendix B, pp. 96–98). While the case was pending on appeal to the Circuit Court of Appeals, the Government was informed that four more of the defendants, United Gas Corporation, United Gas Public Service Company, Nebraska Power Company, and Houston Gulf Gas Company, had absorbed their utility subsidiaries and had ceased to be holding companies within the meaning of the Act, and that still other changes were in process of accomplishment. Subsequent to the decision of the Circuit Court of Appeals, a fifth defendant, Power Securities Corporation, has ceased to be a holding company according to defendants (brief, p. 10n.). And in the past few weeks, defendant American Gas has transferred its service organization to a wholly owned subsidiary (defendants' brief, p. 12n.); so that even if American Gas were registered, it would not come into contact with the service contract provision of section 13 (a), as defendants in both courts below persistently contended was inevitable.

Who can say that the defendants will not have made even more drastic changes in the conduct of their affairs by the time they actually register? Certainly the defendants have made no such assertion. Defendants' future action may be dictated

by a multitude of considerations wholly unrelated to the validity or invalidity of any provision of this Act. The tax policy of the federal government, the tax policy of the states, the administrative policies pursued by the plaintiff Commission and by state regulatory commissions, the trend of public sentiment, the advancement of the art, these and many other social, political, economic, and scientific factors may each vitally affect the future plans and affairs of the defendants.

In these circumstances, an opinion by the District Court as to the validity of the provisions of the Act which by their terms apply only to registered holding companies and their subsidiaries would have been "an advisory decree upon a hypothetical state of facts." *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 325. And such an advisory decree is not within the jurisdiction of any federal court, whether it be desired in the form of an injunction or a declaratory decree under the Federal Declaratory Judgments Act. *New Jersey* v. *Sargent,* 269 U. S. 328; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *Willing* v. *Chicago Auditorium Ass'n,* 277 U. S. 274; *United States* v. *West Virginia,* 295 U. S. 463; *Ashwander* v. *Tennessee Valley Authority, supra; Highland Farms Dairy, Inc.* v. *Agnew,* 300 U. S. 608; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.[28]

[28] The principle denying federal courts jurisdiction to render advisory decrees is deeply imbedded in the Constitution. At the Constitutional Convention in 1787, a proposal

As this Court stated in *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 164:

> The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks.

It was not for the District Court to assume, before defendants had even registered and before there was or could be presented to the Court any specific transaction or definite course of conduct contemplated by defendants, that after defendants do register they may make some offering of securities which cannot and will not be allowed by the Commission under sections 6 and 7, or some acquisition of utility assets or securities which cannot and will not be approved by the Commission under sections 8, 9, and 10; or that after they do register defendants may control or manage their subsidiary companies in a manner which cannot or will not be permitted by the Commission under section 11, or may make some service or other arrangements with their subsidiary companies which cannot and will not be permitted by the Commission under sections

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was offered to empower the Supreme Court to give advisory opinions, and was rejected. 3 Elliott's Debates 445; 2 Farrand Records 77. The declaratory judgment escapes the impropriety of an advisory opinion if, and only if, it is *not* based upon "an uncertain or hypothetical state of facts." *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, 262; cf. *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70.

12 and 13; or that after they do register they may be required by the Commission to make some report under section 14 which they would be unwilling to render, or may keep their accounts in a manner contrary to some rule of the Commission under section 15. The record, for example, does not even show how defendants now keep their accounts or that, if they were now registered, their present accounts would conflict with any requirement of a Commission rule under section 15.

Defendants, for example, asked the District Court to determine the validity of section 11 (b) of the Act. That section authorizes the Commission, as soon as practicable after January 1, 1938, to require that registered holding companies take steps to adjust their size and corporate structure to conform to the standards specified by the Congress. But section 11 contains no absolute prohibitions or limitations of conduct; it is a necessarily flexible regulation and may affect a particular company, if at all, in any one of a variety of ways. It is even possible that a company of the size and scope of Bond and Share might avoid the necessity of divesting itself of any of its assets by becoming a true investment company and ceasing to exercise any controlling influence over operating utility companies.[99] Quite apart from the flexibility

[99] See Report of the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, Senate Report No. 621, p. 11. And as Mr. Eicher stated in his Additional Views in the Report of the House Committee on the Act: "As a matter of fact, the Senate bill makes it pos-

of the administrative technique for which the Congress has provided in section 11, this Court cannot now conjecture what will be the ultimate effect of this section upon a registered company, if and when it becomes applicable by action of the Commission to the specific circumstances and activities of such company.

No action has been or could be threatened or taken against any defendant under section 11.

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sible for any giant holding company to maintain intact its existing corporate structure, however intricate and confusing, and to retain intact the ownership of all of its assets, however heterogeneous and geographically diverse, upon one condition. That condition is that it satisfies the Securities and Exchange Commission that it has ceased to be a holding company within the meaning of the bill, i. e., that it has ceased to exercise any controlling influence over the management and policies of any electric- or gas-operating company and has become simply a passive investment company, holding its assets and the income therefrom for the benefit of its security holders. Here certainly is a 'grandfather's clause' fully protecting all ancient equities which the giant holding companies have acquired for their indispensable widows and orphans.

"The argument has been made that the equities of the giant holding companies cannot be protected if they are denied the right to vote the stock of the operating companies and if the operating companies are denied the benefits of their paternalistic, bureaucratic, and absentee management. So far as the right to vote is concerned, the great mass of utility investors would be immensely benefited by the enfranchisement of the senior security holders of the operating companies, whose stake in the operating companies is usually at least three times more substantial than that of the holding company." Report of the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, Report No. 1318, pp. 50–51.

The Commission is authorized to move under section 11 (b) only against registered companies, and then not until sometime after January 1, 1938, almost two years after the filing of the cross-bill. Any action taken by the Commission after January 1, 1938, must be by an order of the Commission, after notice and hearing and based upon specific findings. After such an order, a company is to have another period, which may be as long as two years, in which to comply; and these orders under section 11 (b) are enforceable only by civil proceedings and not by criminal penalties.

Despite these facts, defendants attempted below to raise the validity of this section solely on the allegation in their cross-bill—unsupported by any evidence in the record and expressly denied by the plaintiff and cross-defendants in their reply—that the *mere existence* of the section is demoralizing their personnel and depreciating the value of their properties. The defendants have not shown that section 11 stands in the way of any concrete course of action contemplated by them. In these circumstances, any attempt by a court to determine the validity of section 11 before action by the Commission and without knowledge of the facts as they may exist when the section will for the first time become operative and to which the Commission by administrative action will apply the legislative standards set forth in section 11, would clearly be "an advisory decree upon a hypothetical

state of facts." *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 325.

It cannot be too strongly emphasized that the inconveniences and uncertainties which the defendants and other non-registered companies complain are caused by the provisions of the Act relating solely to registered companies, have in fact been caused largely if not exclusively by their deliberate failure to register. As soon as the defendants (controlling approximately 15 percent of the entire privately owned electric-utility industry) and other large holding companies register, and as soon thereafter as they embark upon definite courses of conduct, the Commission will be called upon in numerous concrete cases to enter appropriate orders, reviewable by the courts, which will resolve the constitutional issues as they arise in actual controversy in an orderly, intelligent, and judicial way. The defendants cannot ask this Court to pass upon sheer hypotheses and relieve them from embarrassments created not by any action of the plaintiff or cross-defendants, not by any impingement of any provision of the Act upon defendants, but solely by their own efforts to defy and discredit the law.

The defendants have argued, however, that provisions of the Act relating to registered companies may properly be raised by the non-registered defendants in this proceeding because if the District Court had decided and ordered that the defendants must register, the Court should have been able

to settle the whole "controversy" between the Government and the defendants in one proceeding by considering the application of the Act to the defendants as if they were then registered. But the sole basis of such an "adjudication" would still be a hypothetical, not real, state of facts. To assume that the defendants were registered companies would not make the purported controversies over provisions of the Act, or the "facts" to which such provisions would apply, any more real. Cf., *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412, 429–430.

There was no reason for the lower court, and there is no reason for this Court, to assume that further litigation between the Government and the defendants will be inevitable if they register,[1] much less that such litigation, if it takes place, will take place in equity in a district court. The defendants' objections to many of the provisions of the Act relating to registered companies are not dissimilar to their objections to the registration provisions. Indeed, Judge Learned Hand in the court below thought it so clear that the principal provisions of the Act could be sustained by the same arguments which sustain the registration provisions that he did not think it necessary to decide whether or not the registration provisions were separable (R. 2334). If this view were correct, it would follow that the defendants could not, even

[1] Compare pp. 213–214, 214 n., *supra.*

if they were registered and were threatened with prosecution, seek relief from a court of equity against particular applications of those provisions, before they had exhausted their administrative remedies. *Natural Gas Pipeline Co.* v. *Slattery,* No. 230, October Term, 1937, decided December 6, 1937.

Whatever differences of legal opinion may now exist between counsel for the Government and counsel for the defendants as to the validity of the provisions of the Act relating to registered companies, these differences cannot give rise to a "justiciable controversy" when they have had no "fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining." *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324; see also, pp. 232–233, *infra.* A mere difference of legal opinion on questions of constitutional law or statutory construction cannot create a justiciable controversy.

What the defendants in their cross-bill sought from the District Court is not the adjudication of any specific controversy, but a broad advisory opinion declaring in general terms the existence or non-existence of rights and duties under the Act in the event that they register and in the event that after registration they so conduct their affairs as to come into contact with the Act. These events have not taken place and may not take place, or may take place in a manner or in circumstances

which neither this Court nor the defendants can now know. Such an advisory opinion the District Court had no jurisdiction to give them.[2]

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[2] In their brief (pp. 124–125), defendants make a special point of the right of certain of the intervening defendants, who are under no duty to register under the Act and against whom the Government has sought no relief, to obtain a determination "of their rights and liabilities under the Act, consequent upon the registration of such [their] parent holding companies if they be required to register as, in effect, ordered by the decree." This is nothing more or less than an attempt to get the Court to give an advisory opinion upon an advisory opinion. The parent holding companies have not registered and will not register until so required by a final decree from which there is no appeal. The District Court found that the subsidiary companies were controlled by their parent holding companies (R. 2226–2228), and that consequently if transactions through subsidiary companies were not subject to regulation, the Act would be susceptible of ready evasion (R. 2228–2229). The record contains no evidence of any specific transactions contemplated by these subsidiary companies relating to the sale or issuance of securities or to the acquisition of utility assets or securities or to any other matter which allegedly is prevented or obstructed by the Act. The record does not show that any reorganization which may later be required by the Commission to bring parent holding companies and their controlled subsidiaries within the standards prescribed by section 11 will adversely affect these subsidiary companies. Indeed, it is possible that such reorganizations if ordered would not affect at all the corporate structure or activities of the subsidiary companies. Defendants are not concerned about their present constitutional rights or even their immediate business transactions, but are concerned to have the whole Act annulled before its inherent reasonableness and beneficent effects can be definitely perceived.

II. EVEN IF THE CROSS-BILL HAD PRESENTED AN ACTUAL CONTROVERSY, SUCH CONTROVERSY WOULD NOT HAVE BEEN WITH ANY OF THE CROSS-DEFENDANTS

Even if defendants had some semblance of an actual controversy over the so-called control provisions of the Act based upon concrete, present facts, that controversy would not be with the individual cross-defendants. If defendants have any such controversy it is with the Act itself, and they realize that they cannot file a cross-bill against the Act or against the United States. No matter what their grievance against the Congress or the Act, defendants have no grievance with the individual cross-defendants, who bear responsibility only for their own conduct, actual or threatened, not for that of the Congress or any other branch of the Government. In acknowledging the propriety of the dismissal of the cross-bill against the Commission, defendants must have recognized that a suit against the Commission not limited to contesting the legality of any conduct of the Commission or its members was in reality an attempt to sue the United States and must fail for lack of consent by the United States to be sued (see p. 204 n., *supra*).

There has been no act or threat by any individual cross-defendant of which defendants do or could complain. Notwithstanding contrary assertions in defendants' brief (pp. 121–123), the stipulation states in unequivocal terms that the defendants have not been threatened by the Commis-

sion or any cross-defendant with any act or threat to enforce any provision of the Act other than the registration provisions (R. 271–275). The record places beyond dispute, and the District Court found as a fact, that there is, therefore, no present controversy between any of the parties to the instant proceeding (R. 2249–2251, findings 65 and 66). As a matter of fact, the trial court expressly found that neither the plaintiff Commission nor the cross-defendants have taken or threatened any civil or criminal proceedings even against any registered company for failure to comply with the provisions of the Act applicable to registered companies (R. 2250, finding 65). At the present time the plaintiff Commission has done nothing more than administer the Act in the interest of those companies which have voluntarily complied with its provisions.

The cross-bill does not seek to enjoin any specific act or presently imminent threat of the cross-defendants; nor does it seek to have the District Court declare the lawfulness or unlawfulness of any specific act or presently imminent course of conduct of any cross-defendant. Without some action or threat of action by the cross-defendants, defendants' purported controversy as to the validity of divers provisions of the Act cannot be translated into a controversy with the individual cross-defendants, and cannot support a suit against *them* whether for an injunction or a declaratory judgment.

A. AS A SUIT FOR AN INJUNCTION, THE CROSS-BILL, IN THE ABSENCE OF THREATS OF ENFORCEMENT BY THE CROSS-DEFENDANTS, PRESENTS NO CONTROVERSY WITH THEM.

The cross-bill rests not upon any alleged action or threat of action of the Commission or any cross-defendant, but solely upon its allegations, unsupported by any facts in the record, that defendants are suffering great and irreparable damage by the force of the Act itself and its mere existence on the statute books. Defendants have contended that such an injury, alleged to result from the mere existence of a statute, gives a federal court jurisdiction in a cause brought not against the United States (whose enactment of the statute is the alleged wrong of which defendants complain), but against individual government officers who did not enact the statute, who have no power to repeal it, and who admittedly have not taken or threatened any action against defendants under it.

Throughout their argument, defendants have adhered to the novel and unsupportable theory that a justiciable controversy in a suit for an injunction against a non-threatening, non-acting government officer exists if only the party seeking relief alleges in general terms that the mere existence of the statute is causing him irreparable damage. Even if it be assumed for the purposes of this argument that defendants are suffering such damage,[3] that fact

[3] The record does not contain the slightest proof of such damage, and both courts below properly ruled that defendants' failure to prove damage in support of the general

could not create a justiciable controversy between the defendants and any cross-defendant. Proof of irreparable injury justifies and usually impels equity to grant relief; but granting relief means preventing the injury, and this a court can do only if there be within its jurisdiction persons from whose wrongful acts or threats the injury flows. Defendants have stipulated that their injury, whatever it may be, flows not from any act or threat of the Commission or any cross-defendant officer (R. 271–275);[4] their claim is that the alleged injury flows from the statute itself, from action of the Congress. The Congress was not before the trial court.

The requirements of a justiciable controversy which we have here outlined, and which are wholly lacking in defendants' cross-bill, are the very essence of any suit against government officers or agencies to enjoin the enforcement of an allegedly unconstitutional statute. They are not the novel creations of Government counsel. In its earliest

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allegations of the cross-bill required a denial of relief on the cross-bill (see pp. 243–247, *infra*).

[4] It has moreover been shown that not only has there been no act or threat of the Commission or any cross-defendant of which defendants could complain, but that by reason of defendants' retaining their "status of non-registered holding companies," neither the plaintiff nor any cross-defendant has any authority or duty to enforce against the defendants the provisions of the Act relating solely to registered holding companies—or can have such authority unless and until the defendants actually register and come into actual contact with some provision applicable to them (see pp. 208–210, *supra*).

decisions, this Court emphasized the fact that in the absence of some action or threatened action by the official against whom suit is brought, a court of equity could not entertain jurisdiction, because in such event the suit, if anything, was one against the sovereign and would not lie in the absence of consent to be sued.

The jurisdictional requirement of definite action or threats by the government officer or agency sued —not of the State legislature or the Congress—was assumed by Chief Justice Marshall as the necessary basis of his opinion in *Osborn* v. *Bank of the United States,* 9 Wheat. 738,[5] and has many times since been expressly affirmed.[6]

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[5] In holding that the plaintiff there had a cause of action against the defendant officer, the Chief Justice stated (9 Wheat. at 842): "Why may it [the Court] not restrain him [the officer] from the commission of a wrong, which it would punish him for committing?"

[6] This Court gave striking emphasis to this principle when it distinguished the *Osborn* case and denied relief in *In re Ayers*, 123 U. S. 443, on the ground that the plaintiff in the *Ayers* case failed to make out a cause of action against defendant officers based upon some act or threat of *theirs.* The Court stated (123 U. S. at 498–500): "The principal authority relied upon to maintain this proposition [the jurisdiction of a court of equity to restrain the enforcement of unconstitutional state statutes] is the judgment of this court in the case of *Osborn* v. *Bank of the United States*, 9 Wheat. 738. * * * *But the very ground on which it was adjudged* [in the *Osborn* case] *not to be a suit against the State, and not to be one in which the State was a necessary party, was that the defendants personally and individually were wrongdoers, against whom the complainants had a clear right of action for the recovery of the property taken, or its value,*

In *Ex parte Young,* 209 U. S. 123, recognized as a principal authority on the subject, this Court, in holding that a suit against officers who had threatened to enforce the statute against the plaintiff could be entertained, specifically pointed out that jurisdiction was based upon *the illegal acts or threats of the defendant officers themselves.* The Court said (209 U. S. at 155–156):

> The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and *who threaten and are about to commence proceedings,* either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

The recent case of *Ex parte La Prade,* 289 U. S. 444, is conclusive on this point. Suit had there been commenced before a three-judge district court against the attorney general of Arizona to enjoin his threatened enforcement of an Arizona statute. Before final hearing, the attorney general died, and the petitioner took office as his successor. Petitioner resisted an application to substitute him as defendant, on the ground that plaintiffs had no cause of action against him since he had made no

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and that therefore it was a case in which no other parties were necessary. The right asserted and the relief asked were against the defendants as individuals."

threats of enforcement, and that his predecessor's threats could not be the basis of suit against him. The district court rejected this contention and rendered judgment against the new attorney general, holding that the statute imposed the duty of enforcement upon every attorney general; and that as long as there was an attorney general in the state the threat of prosecution was ever present and the resulting injury, if any, was continuously impending.

On a petition by the new attorney general to this Court for a writ of mandamus, the Court held that in the absence of some act or threat of enforcement by the new defendant, the plaintiff had no cause of action *against him* and the trial court had before it no controversy which necessitated or justified its passing upon the validity of the statute attacked. Mr. Justice Butler, writing for a unanimous Court, left no doubt as to this vital jurisdictional problem (289 U. S. at 455, 458):

> The injunctions sought are not aimed at the State or the office of attorney general or to restrain exertion of any authority that belongs to either. * * * *The suits were brought against defendant, not as a representative of the State, but to restrain him individually from, as it is alleged, wrongfully subjecting plaintiff to such unauthorized prosecutions.* * * *
>
> As shown above, the purpose of the suits was to prevent a wrong about to be committed by [the original] defendant acting

> outside, and in abuse of the powers of, his office. The wrongs threatened or committed by him constitute no ground for injunction against petitioner. Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for recovery of penalties shall be brought by the attorney general is not sufficient.[7]

This Court's recent decision in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, is compelling authority on the question here presented.[8] Although a part of the TVA Act was necessarily involved in the determination of the validity of the specific transaction between the Authority and the Alabama Power Company—just as in the instant case the validity of a part of the Holding Company Act is involved in the determination of defendants' duty to register—this Court rejected the contention that there was a controversy as to the Act as a whole, because with respect to the numerous other

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[7] It is in cases of substitution of parties, like *Ex parte La Prade*, that the nature of these suits against government officers is most clearly presented. This Court has consistently held that a suit against an officer to enjoin the enforcement of an allegedly invalid statute "*is in its essence a personal suit to prevent his personal violation of law and the rights of the complainant.*" *Gorham Mfg. Co.* v. *Wendell*, 261 U. S. 1, 4.

[8] The Tennessee Valley Authority, although an agency of the United States, had been specifically given a suable status by the Congress and hence stood in the same position as the individual cross-defendants in this cause.

provisions the Authority had not taken any "action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining" (297 U. S. at 324).

Defendants' suggestion (brief, p. 119) that a different result should be reached here, because the Act allegedly imposes direct restrictions and limitations on the defendants, is wholly unwarranted. The Holding Company Act, including section 11, imposes few, if any, direct restrictions or limitations upon the rights of the defendants; comparatively few of its provisions become automatically applicable to the defendants; generally speaking, they can be implemented and applied to the defendants only by Commission action. In the *Ashwander* case, the contestants sought to establish that the program authorized by the Congress was a menace to their business just as the defendants here seek to show that the program of regulation authorized by the Holding Company Act, and section 11 in particular, is a menace to their business.

But even if the ground upon which defendants seek to distinguish the *Ashwander* case had a factual basis, it would be untenable as a matter of law. In *Ex parte La Prade, supra,* the statute directly restricted and limited the right of the complainant railroad to run a freight train in excess of 70 cars or a passenger train in excess of 14 cars. Not only could the railroad claim a direct limita-

tion on its revenues and an increase in its operating costs, but, under well-established common law rules, if the railroad had violated the statute and an accident had occurred, negligence might have been imputed to it by reason of its breach of statutory duty. Similarly, the statute involved in *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70, directly restricted and limited the right of the complainants to sell leaf tobacco at public auction. Under well-recognized common law principles, the validity of such sales in contravention of the statute would be assailable. Yet this Court dismissed for want of jurisdiction a petition against the commonwealth attorney of Kentucky because there was no evidence that he was exercising or threatening to exercise his authority against the complainants.

There is nothing in *Pierce* v. *Society of Sisters,* 268 U. S. 510, nor *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, nor *Pennsylvania* v. *West Virginia,* 262 U. S. 553, nor *City Bank Co.* v. *Schnader,* 291 U. S. 24—the cases upon which defendants chiefly rely to support their cross bill—which in any way detracts from the Government's argument. In each of these cases there was specific conduct by the person or party sued, which the complainant attacked as illegal because not founded upon valid authority. And in each of them, this Court rested jurisdiction upon such specific conduct or threat of enforcement.

In *Pierce* v. *Society of Sisters,* 268 U. S. 510, suit was brought by private schools against state officers to enjoin the enforcement of an Oregon statute

which required parents to send their children to public schools. Neither the enactment of the statute nor its existence on the books was in any sense the act of defendant officers, and the plaintiffs made no such claim. To the contrary, the plaintiffs based their case upon *present threats made by defendant officers to enforce the statute,* and both the lower court and this Court sustained jurisdiction on that ground.

Although the statute by its terms did not become effective until almost four years after suits were commenced and almost two years after the decision in this Court, it was *alleged that the officers had threatened parents, both in general and in particular instances, with strict enforcement of the statute as soon as it became effective;* that as a result of such *present* threats of future action many parents had already withdrawn their children from plaintiffs' schools and other parents had refrained from sending their children to plaintiffs' schools. The threats alleged in the bills were present and immediate threats made by the defendant officers against the plaintiffs' patrons, even though the officers making them could take no action under the provisions of the statute before a certain future date. The nature of the injury was set out specifically and in detail.

The defendants did not question any of plaintiffs' allegations, either as to the present threats of enforcement or as to the actual injury which plaintiffs were presently suffering by reason of

such threats. The defendants did not otherwise question the jurisdiction of the court. The Court was careful to rest its decision as to jurisdiction on the existence of *present threats of enforcement by defendant officers,* which gave plaintiffs a personal and concrete cause of action against the individual defendant officers. The opinion of the Court leaves no doubt that the essential basis of jurisdiction in the suit to restrain acts of government officials is not the injury done by the existence of the statute itself, but the illegal threats of officers to enforce it (268 U. S. at 533, 535):

> Appellants, law officers of the State and County, have publicly announced that the Act of November 7, 1922, is valid and have declared their intention to enforce it. By reason of the statute *and threat of enforcement* appellee's business is being destroyed and its property depreciated; * * * These [the business and property of plaintiffs] are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action.'

' It is clear from such subsequent citations of the *Pierce* case as have been made, that both this Court and the lower federal courts regard the existence of *threats by the officers* in the *Pierce* case as necessary to the equitable jurisdiction which the Court there sanctioned. See *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, 261; *Milliken* v. *Stone*, 7 F. (2d) 397, 399 (S. D. N. Y. 1925), aff'd, 16 F. (2d) 981 (C. C. A. 2d, 1927), *cert. den.*, 274 U. S. 748;

Terrace v. *Thompson*, 263 U. S. 197, cited as an authority by the defendants, is similar to the *Pierce* case. This Court clearly rested the jurisdiction of the lower court to entertain the suit on the ground that there had been present threats by the attorney general to enforce the statute. (263 U. S. at 214, 216.)

Euclid v. *Ambler Realty Co.*, 272 U. S. 365, involved suit by a landowner to enjoin enforcement of an allegedly unconstitutional municipal zoning ordinance on the ground that the restrictions in the ordinance and the present threats of enforcement prevented plaintiff from selling his land for its more profitable uses. Plaintiff brought his suit against the municipality which had enacted the ordinance and against its enforcing officer, the

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Chicago Auditorium Ass'n v. *Cramer*, 8 F. (2d) 998, 1004 (N. D. Ill. 1925).

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (see pp. 57–58 n., *supra*), the *Pierce* case was cited for the proposition that a suit was not necessarily premature because brought prior to the effective date of the statute. In the *Carter* case, there were clear threats sufficient to give the Court jurisdiction. In the stockholders' suits the corporations were threatening to accept and comply with the code which would compel the cancellation of existing contracts and the assumption of their proportionate share of the cost of administering the code. In the suits to enjoin the Collector of Internal Revenue, it was not denied that the Collector was attempting to collect the tax and that the producer could not claim a drawback without cancelling existing contracts and bearing his proportionate share of the cost of administering the code. Indeed, jurisdiction was not questioned by any of the parties, and the Court on its own motion raised only the question of the prematurity of the suits.

inspector of buildings. Plaintiff specifically alleged that the village and the officer were presently enforcing and threatening to enforce the zoning law. This Court followed its earlier decisions and based jurisdiction on *present* enforcement and threats of enforcement, stating (272 U. S. at 384): "It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee's land so as to confiscate and destroy a great part of its value; *that it is being enforced in accordance with its terms;* * * *." And again, the Court refers to the "*threatened* enforcement of the ordinance" (272 U. S. at 385).

It is important to note that, in the *Euclid* case, the municipality, which was not immune from suit, had been made a party defendant, and injunctive relief had been granted by the lower court against it. Hence, even if the enforcing officer had not been joined in the suit or if he had made no threats, it might possibly have been urged that the act of the municipality in enacting and enforcing the ordinance would have given the court jurisdiction in a suit against the municipality to determine the validity of the municipality's action.[10]

[10] It was on this ground that Judge Parker, in *Appalachian Electric Power Co.* v. *Smith*, 67 F. (2d) 451, 457 (C. C. A. 4th, 1933), *cert. den.*, 291 U. S. 674, distinguished the *Euclid* case and held that it was not authority for plaintiff's contention that jurisdiction exists in a suit against officers of the federal government who have made no threats to enforce the statute or order under attack.

Likewise, *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, was a suit to restrain the city itself—which is not

Unlike the *Pierce* case, *Pennsylvania* v. *West Virginia,* 262 U. S. 553, was not a personal action against government officers, but a suit in this Court, as a court of original jurisdiction, by the States of Ohio and Pennsylvania against the State of West Virginia to restrain the latter from restricting the export of natural gas. Under the Constitution, a state enjoys no immunity from such a suit by a sister state. The very action of the State of West Virginia—itself the defendant—in passing the statute was the action which was alleged to hurt the plaintiff States and from which they sought and obtained relief against the State of West Virginia. And even in such a case, three members of this Court dissented on the ground that the action of the State of West Virginia had not been sufficiently implemented to create a justiciable controversy. Cf. *United States* v. *West Virginia,* 295 U. S. 463.

Certainly there is nothing in *City Bank Co.* v. *Schnader,* 291 U. S. 24, the remaining case upon which defendants rely, which would support the jurisdiction of the District Court to entertain the cross-bill. In that case the executor of a New

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immune from suit—from taking any action which would impair plaintiff's contract to supply water to the city. Although the contention was made that the city had not taken legal action to cancel the plaintiff's franchise, the city had already threatened to cancel the contract and had authorized a bond issue to build or acquire its own waterworks system, and it was against these acts that the plaintiff's bill was directed.

York decedent sought to enjoin officers of Pennsylvania from imposing and collecting an inheritance tax on personal property on the ground that it had no situs in Pennsylvania. As Mr. Justice Roberts pointed out, "the bill charges that the Secretary of Revenue has refused to issue a waiver of tax, and that the Attorney General has notified the appellant and the State's appraiser the property is subject to the tax, and the appellant's claim for exemption will be denied. The Commonwealth's law officers * * * will, unless restrained, cause the assessment and imposition of the tax" (291 U. S. at 34). There were unquestionably specific threats of enforcement. The sole question urged or considered on appeal to this Court was whether the suit was prematurely filed because the threatened assessment had not as yet been formally made. Cf. *Worcester County Trust Co.* v. *Riley,* No. 34, October Term 1937, decided December 6, 1937.

From the preceding discussion it is clear that no decision of this Court supports defendants' cross-bill for injunctive relief against the cross-defendants. Government officers are personally responsible for their conduct if that conduct interferes with the rights of the plaintiff and if it cannot be justified under valid statutory authority. But suits against government officers to restrain the enforcement of allegedly invalid statutes do not exist *in vacuo.* They are personal suits and must be definitely located in and directed at concrete acts

of the person sued. There have been no such acts by the individual cross-defendants, or for that matter by the Commission, to support the cross-bill in this cause.

B. AS A SUIT FOR A DECLARATORY JUDGMENT, THE CROSS-BILL, IN THE ABSENCE OF THREATS OF ENFORCEMENT BY THE CROSS-DEFENDANTS, PRESENTS NO "ACTUAL CONTROVERSY" WITH THEM

The express terms of the Federal Declaratory Judgments Act prevent a court from rendering a declaratory decree upon the basis of the cross-bill and stipulated facts in this cause. The Federal Declaratory Judgments Act is limited to "cases of actual controversy," and this Court has authoritatively stated that in the absence of such a controversy between the parties litigant a declaratory judgment cannot be rendered. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288; *United States* v. *West Virginia*, 295 U. S. 463.

Defendants' cross-bill does not seek to have the District Court declare the lawfulness or unlawfulness of any specific act or presently imminent course of conduct of any of the cross-defendants. They have no authority, and they have not threatened, to enforce against the defendants any provision of the Act applicable to registered companies. Clearly the same reasons which render defendants' cross-bill not a justiciable case for injunctive relief against any cross-defendant (see pp. 227–234, *supra*), negative any contention that the

requisite "actual controversy" exists to satisfy the express, and constitutionally necessary, requirement of the Federal Declaratory Judgments Act.[11]

In substance the defendants' cross-bill for a declaratory judgment as to the validity of the Act in its entirety is a suit against the United States. This Court has many times held that, in suits against the sovereign, the *substance* rather than the *form* of the action is material. *Louisiana* v. *McAdoo,* 234 U. S. 627, 628–629; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387; *Worcester County Trust Co.* v. *Riley,* No. 34, October Term 1937, decided December 6, 1937.

Even if there were some semblance of a controversy between the defendants and the Congress of the United States, there is nothing in the Declaratory Judgments Act which authorizes a federal court to take jurisdiction of such a controversy.[12] The Federal Declaratory Judgments Act

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[11] It is significant that in *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, the case in which this Court has gone the furthest in upholding a declaratory judgment, Mr. Justice Stone stated for the Court (288 U. S. at 262–263): "Thus the narrow question presented for determination is whether the controversy before us, *which would be justiciable in this Court if presented in a suit for injunction*, is any the less so because through a modified procedure appellant has been permitted to present it in the state courts, without praying for an injunction or alleging that irreparable injury will result from the collection of the tax."

[12] It may be questioned whether a federal court would under the Constitution take jurisdiction of such a controversy even if expressly authorized by the Congress. Cf. *Muskrat* v. *United States*, 219 U. S. 346.

contains no reference to suits of any kind against the United States in any capacity; and jurisdiction to entertain such suits cannot be implied. *Schillinger* v. *United States,* 155 U. S. 163, *Price* v. *United States,* 174 U. S. 373; *Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 686.

The real purpose and substance of the cross-bill is to obtain a declaration, not in respect of the legality of any threats or acts of the plaintiff Commission or of any cross-defendant, but in respect of the legislative power of the Congress of the United States; and the United States has not consented to suit.

III. EVEN IF THE CROSS-BILL HAD PRESENTED A CONTROVERSY WITH THE CROSS-DEFENDANTS, THE DISTRICT COURT COULD NOT PROPERLY HAVE GRANTED DEFENDANTS AN INJUNCTION OR DECLARATORY JUDGMENT BECAUSE THEY HAVE PROVED NO DAMAGE, IRREPARABLE OR OTHERWISE

There is not the slightest proof in the record that the defendants have been damaged, irreparably or otherwise. The District Court expressly found as a fact that "defendants have offered no evidence to support a finding, and the record is without any facts which could support a finding, that any defendant or any subsidiary company of any of them has suffered or is suffering any irreparable or substantial damage, impending or threatened, by reason of any act, conduct, or threat of the plaintiff or any cross-defendant or any other officer or agency of the United States, or by reason of the

existence of the Act or any provision thereof or any rule, regulation, or order thereunder" (R. 2250–2251, finding 66).

In lieu of proof, defendants have merely asserted that their damages are "obvious." This failure to insert in the record a single item of damage cannot be regarded as an oversight. The conclusion is inescapable that no proof of damage which would withstand the test of cross-examination is available.

It is thoroughly established that injunctive relief will not be granted by a court of equity without proof of irreparable injury. *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Moor* v. *Texas & New Orleans R. Co.*, 297 U. S. 101. We do not understand defendants to contend otherwise. As the Circuit Court of Appeals stated in this cause (R. 2333): "Mere allegations of irreparable injury will not suffice to warrant an injunction. Facts must appear on which the allegation is predicated in order that the court may be satisfied of the nature of the injury. Argumentative allegations or inferences from facts are insufficient."

And in the absence of proof of injury, defendants were no more entitled to a declaratory judgment than to an injunction. The Federal Declaratory Judgments Act does not require a court to give declaratory judgments in all cases of actual controversy. The Act simply provides that "in cases of actual controversy the courts of the United States shall have power" to grant declara-

tory judgments. The exercise of the statutory jurisdiction rests in the sound discretion of the court. As this Court has pointed out, "the existence of jurisdiction does not mean that it must be exercised and that grounds may not be shown for staying the hand of the Court" (*Kansas City Southern R. Co.* v. *United States,* 282 U. S. 760, 763), and "the statutory grant of jurisdiction to the District Court leaves open the question of the propriety of its exercise." *United States* v. *Bank of New York & Trust Co.,* 296 U. S. 463, 480.[12] Certainly in the absence of irreparable damage there are most impelling grounds for courts to avoid an abstract consideration of the validity of an elaborate regulatory statute of far-reaching public importance before it has been implemented by administrative action and before the effects of its practical operation may be clearly appraised in a concretely delimited controversy.

The Declaratory Judgments Act was not intended, and has not been construed, to uproot a judicial practice, deeply embedded in our consti-

[12] As Mr. Justice Stone stated in *Pennsylvania* v. *Williams,* 294 U. S. 176, 185: "A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest, see *Greathouse* v. *Dern,* 289 U. S. 352, 359, 360, or deny relief upon performance of a condition which will safeguard the public interest and secure substantial justice to the complainant, see *Harrisonville* v. *Dickey Clay Co.,* 289 U. S. 334, 338, would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer."

tutional traditions, that courts will not exercise their most important and delicate duty to pass upon the constitutionality of an act of Congress unless unavoidably necessary to protect the rights of parties litigant from substantial or irreparable injury. "It is only where rights, in themselves appropriate subjects of judicial cognizance, *are being, or about to be,* affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power." *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 162. "If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *Massachusetts* v. *Mellon,* 262 U. S. 447, 488; see also *Liverpool, N. Y. and P. S. S. Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39; *Muskrat* v. *United States,* 219 U. S. 346, 361–362; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324–325; *Alabama Power Co.* v. *Ickes,* Nos. 84 and 85, October Term, 1937, decided January 3, 1938.[14]

[14] *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, cited by defendants, is not to the contrary. All that this Court there held was "that in a case presenting questions under the Constitution of the United States, the Supreme Court had power to review a declaratory judgment of a state court so long as the essentials of an adversary proceeding, actual controversy, and finality of judgment were present" (Patterson, J., in *Zenie Bros.* v. *Miskend,* 10 F. Supp. 779, 780 (S. D. N. Y. 1935)). The sole issue before this Court in the *Nashville* case was whether there was present a contro-

"The new power to make a declaratory decree does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin. The declaratory decree is a useful form of remedy, but the statutory provision for it (Declaratory Judgment Act, 28 U. S. C. A. § 400) does not enlarge the scope of equity jurisdiction to permit its application to controversies which have not yet reached the judicial stage" (*Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. (2d) 97, 100 (C. C. A. 5th, 1936), *cert. den.*, 299 U. S. 559).[15]

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versy in the technical sense. And a controversy clearly existed because the collection of the tax had been threatened. The state court alone had power to determine, and had determined, the desirability of its exercising jurisdiction. The question in the state court was the validity of a gasoline tax, a relatively simple and restricted question. While it is true that irreparable damage had not been pleaded, the Tennessee statutes, of which the state court could take judicial notice, authorized the comptroller to collect the tax by distress warrant (Shannon's Annotated Code of Tennessee, Supp. 1926, section 723a–41) and also barred any suit for refund even if the tax were paid under protest (*Id.*, section 723a–37). This provision was subsequently amended by the Tennessee Acts of 1933, c. 130 (1933 Supplement, Michie's Tennessee Code of 1932, section 1138).

[15] The *Bradley* case was decided by the same court which had decided *Gully* v. *Interstate Natural Gas Co.*, 82 F. (2d) 145 (C. C. A. 5th, 1936), cited by defendants. In that case the trial court had found (8 F. Supp. 174, 175) that there was no adequate remedy at law and that the plaintiff was in immediate danger of irreparable loss; and no question of constitutionality was involved.

IV. DEFENDANTS DO NOT SEEK EQUITY WITH CLEAN HANDS IN BRINGING, BEFORE THEY HAVE REGISTERED, A CROSS-BILL WHICH PRESUPPOSES THAT THEIR FAILURE TO REGISTER IS UNLAWFUL

Only if defendants are legally bound to register as determined on the bill and answer, would defendants have even hypothetical concern with the other provisions of the Act, because those provisions are by their terms applicable solely to "registered" companies. The cross-bill, therefore, if it is to be regarded as serving any purpose, must have been framed on the presupposition that defendants are legally required to register and that their failure to register is without legal justification.

A suppliant who seeks the affirmative relief of a court of equity must come to that court with clean hands. "A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity." *Deweese* v. *Reinhard,* 165 U. S. 386, 390. Measured by such a standard, the defendants have at all times had unclean hands in seeking affirmative relief under their cross-bill.

It could scarcely be supposed that a court of equity would entertain the cross-bill if the defendants had come into court and admitted the validity of the registration provisions but asserted that they had refrained from registering for the express pur-

pose of avoiding any possible application to them of the other provisions of the Act, until after the court had determined for them which, if any, of such provisions were valid. Yet that is exactly what the defendants by their cross-bill asked the District Court to do. And that is exactly what their counsel advised them to do (R. 268).

The Government does not suggest that defendants by their conduct have barred themselves from setting up the alleged invalidity of the statute insofar as it is, or may be, enforced against them. But defendants are here seeking affirmative equitable relief. The District Court found that defendants were obliged to register; by that very finding it necessarily found also that the defendants were unjustifiably defying the law of the land. Those who have deliberately broken or failed to observe the law in order to render certain provisions of an Act inapplicable to them have no standing in equity to ask affirmative relief against the very provisions from which they have protected themselves by their own unlawful conduct. It would have been improper for the District Court, sitting as a court of equity, to have heard the defendants' complaints as to the alleged effect upon them of these provisions of the Act until defendants have absolved themselves for their unlawful conduct by actually complying in good faith with the registration provisions.

The cross-bill is an attempt to secure from the District Court—upon the assumption that the

defendants have violated without legal justification the registration provisions of the Act—an interpretation and an advisory opinion upon the validity of the numerous provisions which can affect them, if at all, only *in futuro*. It is an effort to circumvent the administrative procedure provided by the Congress for the implementation of a complicated regulatory Act. If this Court determines, as did the District Court and the Circuit Court of Appeals, that defendants' failure to register is without legal justification, it cannot, in accordance with established equitable principles, require the District Court to determine defendants' rights under the Act as registered companies until after they have complied with the law and actually become registered companies.[16]

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[16] There are no extenuating circumstances which could warrant condoning defendants' illegal conduct. Through their representatives, defendants appeared before the committees of the Congress when the Act was under consideration and, although they opposed the passage of the Act as introduced and in its final form, insisted before the Congress that they were in favor of federal regulation of utility holding companies. The defendants were also represented upon and cooperated with the so-called Committee of Public Utility Executives. Both that Committee and the defendants insisted that although they were opposed to the proposed bill, they were not opposed to federal regulation. Indeed, that Committee and the defendants asserted that they favored appropriate federal regulation. In response to a request from the Senate committee for specific amendments (R. 276–277), the Committee of Public Utility Executives, representing the defendants and others and financed by the defendants and others, presented to the committees of the Congress a revision of the original draft of this Act as it had been intro-

CONCLUSION

The only issue before the District Court or before this Court is the validity of sections 4 (a) and 5 of the Act as applied to the defendants against

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duced and that revision is included in the stipulation as exhibit 8 (R. 655ff.).

Many of defendants' amendments were adopted by the Congress and many more were accepted in part. As the Senate Committee stated in reporting the bill to the Senate: "Every objection of the opponents of the bill was carefully considered by the committee in the course of a week of executive sessions, spent in discussing word for word the original bill *and all proposed amendments*. As the result of hearings, *and the proposed amendments*, the committee has so extensively amended S. 1725 [the bill as introduced] that the committee has thought it advisable to report a substitute bill" (Report of the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, Senate Report No. 621, p. 1).

Mr. Inch, President of Bond and Share, was emphatic in his testimony before the House committee as to the attitude of the Bond and Share companies. "Please let me say again," he stated, "that we are not opposed to any proper regulation which may be necessary for the protection of either investors or rate payers" (Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on H. R. 5423, Part 2, p. 1220). Certainly the requirement of registration and the furnishing of information regarding important corporate and financial affairs is the simplest and least onerous of any "regulation necessary for the protection of investors and rate payers."

But the defendants came before the District Court and now come before this Court to contest as unreasonable, arbitrary, and beyond the power of the Congress all the provisions of the Act—including many provisions which the

whom the Government sought and obtained relief. This restriction of the issues is sought by the Government not upon the basis of any technical or arbitrary rule of law or of procedure. The restriction is dictated by considerations of policy and principle fundamental in our federal system of judicial review.

Committee of Public Utility Executives and the defendants professed either to favor or not to oppose. The President of Bond and Share, for example, expressly approved giving the Commission power, subject to judicial review, to remove any intermediate holding company if its removal served the public interest. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on H. R. 5423, Part 2, p. 1216.

Despite the fact that the registration provisions of the Act are almost identical with those in the suggested amendments submitted by the Committee of Public Utility Executives (R. 655, 668–674), the defendants have refused to comply with those provisions. The defendants now seek to attack not simply the provisions of the Act the passage of which they opposed, but the informatory registration provisions which are the very minimum of any reasonable federal regulation.

The defendants have made no attempt to justify the singular inconsistency in the representations which they made to the Congress and those which they have made to this Court. Defendants avoided the issue below by asserting that if any equitable estoppel to attack the constitutionality of the present Act may be predicated on such grounds, the right of petition is gone (brief before District Court, p. 165). The right of petition is sacred; but it does not abrogate the rules of equity and good conscience.

The Government no less than the defendants might secure certain definite advantages by having this Court pass upon the validity of the Act and each of its provisions, so that the Commission could proceed with the administration and enforcement of the entire Act and have its constitutional powers once and finally determined. The system of advisory opinions is not without advantage; it has found acceptance in the jurisprudence of some of our states and of a number of foreign countries.

The use of advisory opinions was, however, rejected by the Constitutional Convention of 1787 (1 Willoughby, Constitutional Law of the United States (2d ed., 1929) 29), and not without reason. There are grave objections to advisory opinions, particularly in constitutional cases. The limitation of the judicial function under our Constitution to the adjudication of definitely defined and immediately concrete controversies was, not unwisely, considered necessary to ensure the separation of the three great powers of government, the legislative, executive, and judicial. Courts are not concerned with political or partisan issues as such; and to force upon the courts the review of legislation severed from concreteness of a vital controversy where the issues of law and of fact are specifically defined and definitely limited, would go far to discredit the judicial process, and would

throw upon the judiciary the full impact of bitter partisan and political strife.

It is the strength and merit of the judicial process that it limits itself to concrete issues in genuine controversy. The reasonableness or unreasonableness of a legislative enactment or administrative rule can be determined only in light of specific application to concretely understandable facts. There are, in particular, grave difficulties in a court's passing upon an extensive regulatory statute before it has been implemented by administrative action and before its practical operation and working can be fairly appraised. The ultimate protection afforded by the great constitutional guarantees is to be founded not in general and sweeping declarations based upon hypothetical controversies, but in actual and precise adjudications of public and private right.

It is submitted, therefore, that the issues sought to be raised by defendants' answer to plaintiff's bill have been correctly limited by the courts below to the validity of the registration provisions of the Act as applied to the defendants; that the registra-

tion provisions as so applied are valid; and that the defendants' cross-bill was correctly dismissed.

Respectfully submitted.

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